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CONTAINING

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IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW

1959

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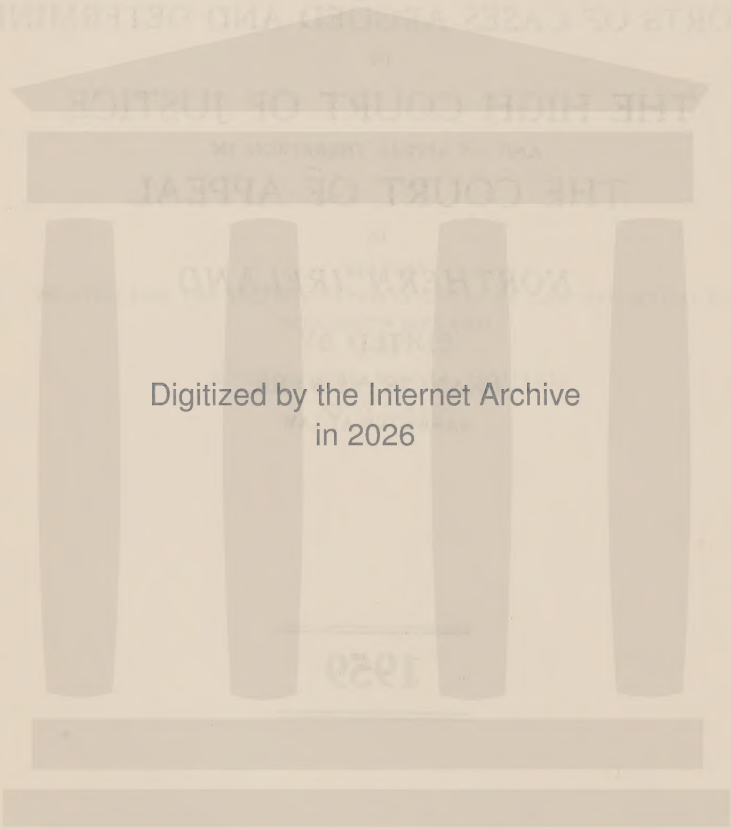

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TABLE OF CASES REPORTED

IN THIS VOLUME

B

Ballymena Borough Council and another, Kissack and others ("Ulster Fatstock Co.") *v.* 40

Belfast Corporation, O. D. Cars Ltd. *v.* 62

Boyle, Joseph Morton (Banbridge) Ltd. *v.* 141

Brand, Lynn *v.* (Practice note) 140

Brand, Stewart *v.* (Practice note) 140

C

Cavanagh *v.* Ulster Weaving Co. Ltd. 109

Clingen, Mahon *v.* 37

Colhoun, Scampton *v.* .. 106

E

Eccles *v.* McBurney 15

K

Kennedy, Northern Irish Trust *v.* 139

Kerr *v.* Mitchell and another 21

Kissack and others ("Ulster Fatstock Co.") *v.* Ballymena Borough Council and another 40

L

Loney, Montgomery *v.* .. 171

Lynn *v.* Brand (Practice note) 140

M

McBurney, Eccles *v.* .. 15

McGimpsey *v.* O'Hare .. 98

McKenna, Simpson *v.* .. 1

Mahon *v.* Clingen 37

Mitchell and another, Kerr *v.* 21

Montgomery *v.* Loney .. 171

Morton, Joseph, (Banbridge) Ltd. *v.* Boyle 141

N

North Down Rural District Council, Rainey *v.* 161

Northern Irish Trust Co. *v.* Kennedy 139

O

O. D. Cars Ltd. *v.* Belfast Corporation 62

O'Hare, McGimpsey *v.* .. 98

R

Rainey *v.* North Down Rural District Council 161

S

Scampton *v.* Colhoun .. 106

Scottish Co-Operative Wholesale Society Ltd. *v.* Ulster Farmers' Mart Co. Ltd. .. 46

Simpson *v.* McKenna .. 1

Stewart *v.* Brand (Practice note) 140

T

Trainor, White *v.* 147

U

Ulster Farmers' Mart Co. Ltd., Scottish Co-Operative Wholesale Society Ltd. *v.* 46

Ulster Weaving Co. Ltd., Cavanagh *v.* 109

W

White *v.* Trainor 147

TABLE OF CASES CITED

PAGE

A

Assoc. Provincial Picture Houses *v.* Wednesbury Corporation .. 42
A.-G. *v.* De Keyser's Hotel .. 67

B

Bailey *v.* Potteries Electric Traction 30
Benson *v.* N.I. Road Transport Board 83, 97
Berry Ltd. *v.* Royal Bank of Scotland 42
Brennan *v.* Gale 122
Bridgland *v.* Shapter 56
Brown *v.* Belfast Water Commrs. 18
Buchanan *v.* Motor Insurers 184, 191
Bugge *v.* Taylor 181, 192
Burgess *v.* Northwich Local Board 166
Burrows *v.* Hall 6, 10

C

Central Coal Board *v.* Cannon Brewery Co. 67
Commonwealth of Australia Bank *v.* Bank of N.S.W. 88
Cowper Essex *v.* Acton Local Board 169
Cresswell *v.* Sirl 15

D

Davidson *v.* Adair 191
Dillon, *In re*.. .. .. 100, 103
Diss Urban Sanitary Authority *v.* Aldrich 104
Dorchester, Mayor of *v.* Ensor .. 53
Dorman, Long & Co. *v.* Hillier .. 119
Downshire *v.* O'Brien 54

E

Edwards *v.* A.-G. for Canada .. 87
Elkins *v.* Cartlidge .. 181, 191
Elwes *v.* Payne 53

F

Foster *v.* Murphy 16
France, Fenwick & Co. *v.* The King 80
Fraser *v.* Minister of National Revenue 43

G

Gallagher *v.* Balfour, Beatty & Co. 136
Garretty *v.* Potts 103
General Cleaning Contractors *v.* Christmas.. 136
Glasgow Corporation *v.* Muir .. 126
Glynn *v.* Simmonds 183
Graff Bros. Estates *v.* Rimrose etc. Board 107
G.E. Rly. *v.* Goldsmid .. 53, 59
Griffin *v.* Squires 186

PAGE

H

Hammersmith Rly. *v.* Brand .. 166
Harrison *v.* Hill .. 179, 192, 196
Hervey-MacLeay *v.* Patton .. 42
Higgins *v.* Harrison 35
Hopwood *v.* Rolls-Royce .. 119, 121
Horn *v.* Sunderland Corporation.. 166
Hughes *v.* Justin 141
Hughes & Vale Co. *v.* State of N.S.W. 94
Hutchinson *v.* Manchester etc. Rly. 13
Horton *v.* Colwyn Bay 169

J

James *v.* Cowan 94
John Summers & Sons *v.* Frost .. 35
Jones *v.* Richards 34

L

Lancaster *v.* Moss 107
Lochgelly Iron Co. *v.* McMullan 107
London Corporation *v.* Lyons & Co. 53
L.N.W. Rly. *v.* Reddaway.. .. 169
L.P.T.B. *v.* Upson 108
Londonderry C.C. *v.* McGlade .. 64
Loughrey *v.* Doherty 56

M

McCartan *v.* Belfast Harbour Commrs. 31
Macclesfield, Mayor of *v.* Chapman 56
Metro. Rly. *v.* Wright 124
Mitchell *v.* N. British Rubber Co. 35
Mitchell *v.* Reynolds 92
Morris *v.* W. Hartlepool Steam Navigation .. 118, 124, 125, 132
Morton *v.* Wm. Dixon Ltd. 117, 123, 125, 129, 132, 136
Mugler *v.* Komsas 67
Murphy *v.* Kearns 142
Marshall *v.* L.P.T.B. 107

N

Nakkuda Ali *v.* Jayaratne 95
Nash *v.* Hollinshead .. 30, 31
N.I. Road Transport Board *v.* Benson 80
N.I. Road Transport Board and Century Insurance Co., *In re* .. 31
Northern Transportation Co. *v.* City of Chicago 85, 89

O

O'Brien *v.* Trafalgar Insurance Co. 191
O'Connor *v.* Synott .. 176, 190
O'Malley *v.* Kilmallock Union .. 142
O'Neill *v.* N.I. Road Transport Board 80

PAGE

P

Paris *v.* Stepney B.C. 117, 123, 125, 132
Paterson *v.* Ogilvy 184, 193
Pennsylvannia Coal Co. *v.* Mahon 89, 94
Purves *v.* Muir 196

R

R. *v.* Collinson 179
R. *v.* Mountford 169
Reg. (Lambe) *v.* Armagh JJ. .. 101
Ricket *v.* Metro Ry. 166
Robb *v.* N.I. Electricity Board .. 81
Russell *v.* Thompson 183

S

Sewell *v.* Taylor 173
Simmonds *v.* Cronin 142
Simpson *v.* Morrison 6
Sisters of Charity of Rockingham *v.* R. 167
Stanger *v.* Hendon B.C. 30
Staveley *v.* Barrington 18

T

Tewkesbury, Bailiffs of *v.* Bricknell 56
Thomas *v.* Dando 182
Tiverton etc. Ry. *v.* Loosemore .. 67
Town Investments Ltd., *In re* .. 42
Turner *v.* Sterling 56

U

Ulster Transport Authority *v.* Jas. Brown & Sons 80
United States *v.* Cansby 85
United States *v.* General Motors Corporation 97

V

Venables *v.* Scottish Agricultural Department 166
Village of Euclid *v.* Ambler Co. 85, 90

W

Walker *v.* Bletchley Flettons Ltd. 27
Walshe *v.* Taggart 158, 182
Welch *v.* Swasey 85, 89
Wells *v.* Head 17
West *v.* Potts 104
Wilcox *v.* Steel 53
Wilsons & Clyde Coal Co. *v.* English 115
Wood *v.* L.C.C. 31

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

SIMPSON v. McKENNA[1]

Motor vehicle—Offence involving disqualification for a minimum period—Jurisdiction to order disqualification limited to vehicles of a particular class or description—Road Traffic Act (Northern Ireland), 1955 (4 & 5 Eliz. 2. c. 27), ss. 39 (2), 57 (1).

The proviso to section 57 (1) of the Road Traffic Act (Northern Ireland), 1955, which empowers a court imposing an order of disqualification from holding or obtaining a driving licence under that section to limit the disqualification to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed, applies to all orders of disqualification, including such orders as the court is required to make by reason of the fact that some other provision of the Act requires an order of disqualification for a period not less than a specified minimum period. Accordingly, where a driver was convicted under section 39 of the Act for being in charge of a motor car while under the influence of drink it was *held* that the court had power to limit the disqualification for the minimum period to a motor car other than a goods vehicle.

Per Lord MacDermott L.C.J. The discretion so to limit a disqualification should be used sparingly in cases of conviction for driving or being in charge of a motor vehicle under the influence of drink or drugs, and only where the public interest is not likely to be jeopardised.

CASE STATED by the Resident Magistrate sitting at Belfast Petty Sessions.

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black L.J.: Dec. 11, 1958; May 28, 1959.

On September 3, 1958, the defendant and respondent, Patrick Joseph McKenna, a lorry driver, pleaded guilty to a charge of being in charge of a motor vehicle on September 2, 1958, while under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle, contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955. The vehicle which was the subject of the charge was a private motor car. It was submitted on behalf of the defendant that though a conviction under section 39 of the Act[1] involved disqualification for a minimum period it was open to the magistrate to limit the disqualification under section 57 (1) of the Act[2] to the driving of a motor vehicle of the same class or description as that in relation to which the offence had been committed, namely a private motor car. The magistrate accepted this submission. He imposed a fine on the defendant and ordered that he be disqualified from holding or obtaining a licence in respect of a motor car other than a goods vehicle (being the class or description of the vehicle in relation to which the offence was committed) for a period of twelve months, but at the request of the complainant and appellant he stated this case for the opinion of the Court of Appeal, the question raised being whether he had the power to limit the disqualification from holding or obtaining a driving licence, which he was obliged to impose by virtue of section 39 (2) of the Act of 1955, to holding or obtaining a licence in respect of a motor car other than a goods vehicle.

Nicholson Q.C. and *McConnell* for the complainant and appellant.

McBirney for the defendant and respondent.

Cur. adv. vult.

[1] Road Traffic Act (Northern Ireland), 1955, s. 39 (2): "A person convicted "of an offence under this section "shall be disqualified from holding "or obtaining a licence for a mini- "mum period of—(a) in the case of a "first conviction for such an offence, "twelve months...."

[2] Road Traffic Act (Northern Ireland), 1955, s. 57 (1): "Without prejudice "to any other penalty, any court "before whom a person is convicted "of any offence under this Act, or of "any offence in connection with the "driving of a motor vehicle punish- "able (whether on indictment or "summarily) otherwise than under "this Act may order him to be dis- "qualified from holding or obtaining "a licence for such period as the "court thinks fit and where any pro- "vision of this Act requires him to "be so disqualified for a minimum "period, shall order him to be dis- "qualified for a period which is not "less than that minimum period.

"Provided that if the court thinks "fit, any disqualification imposed "under this section may be limited "to the driving of a motor vehicle of "the same class or description as the "vehicle in relation to which the "offence was committed."

LORD MACDERMOTT L.C.J.: The defendant, Patrick Joseph McKenna, who is the respondent in this appeal by way of case stated, is a lorry driver. On September 3, 1958, he pleaded guilty at Belfast Petty Sessions to being, on the previous day, in charge of a motor car on a road in the City of Belfast while under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955. The resident magistrate fined the defendant and disqualified him from holding or obtaining a licence for a period of twelve months; but, acting on what he considered to be the proper interpretation of section 57 (1) of the Act of 1955, he limited this disqualification to holding or obtaining a licence in respect of a motor car other than a goods vehicle.

The defendant was charged and convicted under section 39 (1) of the Act of 1955. Subsection (2) of that section enacts that:

"(2) A person convicted of an offence under this section shall be "disqualified from holding or obtaining a licence for a minimum "period of—

"(a) in the case of a first conviction for such an offence, twelve months...."

The word "licence" as used in this subsection is one of wide import. In the interpretation section, which is section 75, it is said to include a "driving licence", and a "driving licence" is defined as a licence to drive a "motor vehicle" granted under section 13; while, as appears from sections 1 and 3, the expression "motor vehicle" has a range of meaning which comprises no less than seven main classes, namely, heavy locomotives, light locomotives, motor tractors, heavy motor cars, motor cars, motor cycles and invalid carriages. Accordingly, if section 39 (2) were the only provision to be regarded the disqualification which would have had to be imposed upon the defendant would have been one relating to motor vehicles generally and could not have been one restricted so as to relate to motor cars other than goods vehicles.

At petty sessions and before this court, however, it was contended on behalf of the defendant, that the first proviso to section 57 (1) of the Act of 1955 altered this situation and empowered the resident magistrate to order a restricted disqualification as he did. The material part of section 57 (1) runs thus: "(1) Without prejudice to "any other penalty, any court before whom a person is convicted of "any offence under this Act, or of any offence in connection with the

"driving of a motor vehicle punishable (whether on indictment or "summarily) otherwise than under this Act may order him to be "disqualified from holding or obtaining a licence for such period as "the court thinks fit and where any provision of this Act requires him "to be so disqualified for a minimum period, shall order him to be "disqualified for a period which is not less than that minimum "period.

"Provided that if the court thinks fit, any disqualification imposed "under this section may be limited to the driving of a motor vehicle "of the same class or description as the vehicle in relation to which "the offence was committed."

The disqualification actually ordered, namely, "from holding or "obtaining a licence in respect of a motor car other than a goods "vehicle" was not challenged before us as respects the aptness or accuracy of the description of motor vehicle which it employs, and we may assume that it designates a motor vehicle "of the same class or "description" as the motor vehicle in relation to which the offence was committed. The only point taken by the complainant was whether the proviso to section 57 (1) which I have just set out applied at all in the case of a conviction under section 39. Under that section, it was said, the disqualification for the minimum period followed automatically on conviction and could not be described as a disqualification "imposed under" section 57.

It is true that section 57 (1) starts by conferring a wide discretionary power of ordering a period of disqualification so as to make this form of penalty available in the case of offences for which the Legislature has not provided expressly for disqualification. But the subsection goes further than this. Not only is the court to have this general power as respects an offender, but "where any provision of "this Act requires him to be so disqualified for a minimum period," the court "shall order him to be disqualified for a period which is not "less than that minimum period." When the court, in obedience to that direction, orders disqualification for not less than the minimum period is that disqualification "imposed under" section 57? It will be convenient, in the first place, to consider this question apart from authority.

The words "under this section" are certainly apt to refer to any disqualification imposed by virtue of the general power to order disqualification which is provided for in section 57 (1) and not elsewhere. But, as we have seen, section 57 (1) proceeds deliberately to

embrace the enactments expressly providing for a minimum period of disqualification by directing the court to order, in such cases, disqualification for at least the minimum period. Whenever this injunction is obeyed it is not, I think, an abuse of language to say that the disqualification is "imposed under" section 57. The preposition is capable of applying alike to orders for disqualification which are discretionary and to those which are not. "Imposed under this "section" obviously means "imposed by order under this section" and I do not see that it can mean anything else. In the present case the disqualification, being for the minimum period, might be said to be imposed *by* section 39 (2) and, no doubt, if a longer period of disqualification had been ordered it might be described as imposed *by virtue of* that subsection. But this does not seem to me to touch on the scope of the proviso to section 57 (1). In its context it applies to any disqualification that has been imposed under the preceding part of the subsection and I can find no ground in the language used for discriminating in this respect between what is imposed as a matter of discretion and what is (to the extent of the minimum period) mandatory.

There is nothing that I can discern in the text of the Act of 1955 to lead to a different conclusion. But it was argued that the Legislature could not have intended to allow a discretionary restriction of the disqualification in cases like the present. It was said that an offence under section 39 (1) was of a kind that, so far as the public interest was concerned, had nothing to do with the class or description of the vehicle in relation to which the offence was committed: a driver under the influence of drink or drugs was a public danger no matter what the nature of the motor vehicle he was driving or in charge of. I do not think that is a sound argument, for the view which the text leads me to favour only imputes to the Legislature a desire to cater for the circumstances of the individual case by giving a discretion to the court by which those circumstances will be examined, and no one can, in the nature of things, confidently aver that a case meriting a restricted disqualification cannot arise under section 39. If, for example, a disabled ex-service man, on some unusual occasion, were to be found drunk at the wheel of a motor lorry, a court which had to disqualify him from using his invalid carriage might well be thought to have less discretion than the interests of justice required. That, of course, would be an exceptional case, and no responsible person would want to suggest that a discretion of the kind under discussion should be used, in relation to section 39 (1), otherwise than sparingly and where the public interest is not likely to be jeopardised. But

notwithstanding the serious nature of any offence under that subsection, I see nothing sufficiently improbable in the view that the Legislature intended the courts to have this important discretion to justify a departure from the natural meaning of the language it has used.

It remains to consider whether a different conclusion is indicated or required by authority. In *Simpson v. Morrison*[1] the point arose under the Road Traffic Act, 1930, but did not call for decision and was not decided. The Lord Justice-Clerk (Lord Thomson), referring to the sections corresponding to sections 39 (1) and 57 (1) of the Act of 1955, expressed his doubts but kept the matter open when he said[2] "....even assuming that section 15 can be read along with "section 6, which to my mind is by no means clear....." The defendant relied upon *Burrows v. Hall*[3]. This case, a decision of the King's Bench Division in England, has a very close bearing on the present issue. There, a lorry driver was convicted of using his private motor car at a time when it was not insured against third-party risks as required by section 35 of the Road Traffic Act, 1930. That section, which is in Part II of that Act, provides for a minimum period of disqualification on conviction of twelve months, and also provides that a person disqualified thereunder "shall, for the purposes of "Part I of this Act, be deemed to be disqualified by virtue of a con-"viction under the provisions of that Part." Part I of that Act enacts a series of driving offences—e.g. section 11 (reckless or dangerous driving) and section 15 (driving while under the influence of drink or drugs)—and also makes provision for disqualifications. Section 7 relates to what may happen after disqualification by virtue of a conviction or order under "this Part of this Act," and section 6 (1) confers a power to disqualify on "any court before which a person is "convicted of any criminal offence in connection with the driving of "a motor vehicle (not being an offence under Part IV of this Act)." Then comes a proviso in the exact terms of the proviso to section 57 (1) of the Act of 1955, which I have already quoted. In *Burrows'* case[3] it was held that the court could, in the exercise of its discretion under this proviso, limit the disqualification which it had to impose to the driving of private motor cars so that, as in the case of the present defendant, the driver remained free to continue his occupation of driving lorries. The King's Bench Division laid some stress on the words of section 35 relating to Part I of the Act of 1930, and it

[1] [1951] S.C. (J) 82.
[2] Ibid. 86.
[3] [1950] 2 K.B. 476.

may also be observed that section 6 seems clearly capable of being applied to section 35 for it is not confined to offences created by Part I of that Act.

I find it difficult to see any firm ground on which the decision reached in *Burrows v. Hall*[1] can be assailed, and if that decision is right I think it can mean nothing less than that the words "imposed "under this section" in the proviso to section 6 (1) of the Act of 1930 are capable of applying to a disqualification which is mandatory under some other provision of the same statute. No doubt, that Act and the Northern Ireland Act of 1955, though similar in many ways, differ in certain respects, including the order and sequence of some of their provisions. The general terms of section 6, for instance, precede the enactment of the offences to which that section relates, whereas section 57 of the Northern Ireland Act comes after the provisions thereof which create driving offences. There is, however, nothing in this or in the other variations which suffices, in my opinion, to justify construing these words—"imposed under this "section"—more narrowly in section 57 (1) than in section 6 (1); and if that is so, *Burrows v. Hall*[1] supports the view I have formed on a consideration of the text.

For these reasons I am of opinion that the learned resident magistrate was right in law in his conclusion, and I would therefore answer the question submitted by him for the opinion of this court in the affirmative.

BLACK L.J.: This case turns upon a narrow but to my mind very difficult point as to the precise effect of the first proviso to section 57 (1) of the Road Traffic Act (Northern Ireland), 1955, which reads: "Provided that if the court thinks fit, any disqualification imposed "under this section may be limited to the driving of a motor vehicle of "the same class or description as the vehicle in relation to which the "offence was committed."

The respondent was convicted under section 39 of the Act of 1955 of having been in charge of a motor vehicle on a road while under the influence of drink or drugs to such extent as to be incapable of having proper control of the vehicle. Subsection (2) of section 39 enacts that a person convicted of an offence under the section shall be disqualified from holding or obtaining a licence for a minimum period of twelve months in the case of a first conviction for such an

[1] [1950] 2 K.B. 476.

offence. The offence was committed by the respondent in relation to a motor car and, as the respondent was a lorry driver, the learned resident magistrate in imposing upon him the disqualification from holding or obtaining a licence for twelve months purported in reliance on the first proviso to section 57 of the Act of 1955 to limit the disqualification to one of holding or obtaining a licence in respect of a motor car other than a goods vehicle. The question at issue is whether this proviso to section 57 enables a court to limit in this way a disqualification arising from a conviction under section 39 of the Act.

Part V of the Act of 1955, which commences with section 38, is headed "Motoring Offences and Enforcement". A number of the earlier sections of this Part of the Act deal with what the Legislature clearly considered to be serious offences and provide that convictions for such offences shall (subject to certain limited exceptions in regard to special cases) automatically entail disqualification of the persons convicted for specified minimum periods. Thus section 38 (4) enacts that a person convicted of a second or subsequent offence of dangerous driving shall be disqualified from holding or obtaining a licence for a minimum period of twelve months. Similarly, section 39 (2) provides that a person convicted of driving or being in charge of a motor vehicle while under the influence of drink or drugs to such extent as to be incapable of having proper control of the vehicle shall be disqualified in case of a first conviction for a minimum period of twelve months, and in the case of a second or subsequent conviction for a minimum period of three years. And section 41 (2) directs that a person convicted of using a motor vehicle without being covered by third-party insurance as prescribed by the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, shall be disqualified for a minimum period of twelve months. So, too, section 43 (2) provides that a motorist convicted of a third or subsequent offence of exceeding a speed limit shall be disqualified for a minimum period of six months. And section 50 (3) enacts that a motorist convicted of knowingly failing to stop and give the particulars prescribed by the section and report the accident to the police where a person has received personal injury or has died as the result of the accident shall be disqualified for a minimum period of twelve months. In addition to the sections I have mentioned in which the Act directs a conviction to entail automatically a period of disqualification the Act contains a considerable number of provisions creating offences of various types for which appropriate sentences of fine or imprisonment may be imposed but which do not involve the automatic disqualification of

the person convicted. Then comes section 57, the section of the Act with which this case is particularly concerned. Subsection (1) of section 57 reads: "Without prejudice to any other penalty, any court "before whom a person is convicted of any offence under this Act.... "may order him to be disqualified from holding or obtaining a "licence for such period as the court thinks fit and where any pro- "vision of this Act requires him to be so disqualified for a minimum "period, shall order him to be disqualified for a period which is not "less than that minimum period."

This provision is then qualified by the proviso which I have quoted at the outset of this judgment. The net question in this case is whether the disqualification of the respondent was in the words of this proviso to section 57 (1) "imposed under this section" so as to entitle the resident magistrate to limit the disqualification or whether as contended by the appellant it was imposed not under section 57 but under section 39 (2). It may be convenient here to quote also section 57 (8) which provides: "Nothing in any other provision of this Act or in "any other enactment authorising or requiring the court to disqualify "any person from obtaining or holding a licence for a specified period "shall operate to restrict the powers of the court under subsection (1) "to disqualify that person for such longer period as the court thinks "fit."

The appellant's contention is that upon the conviction of the respondent under section 39 of the Act, his disqualification from holding or obtaining a licence for a minimum period of twelve months automatically followed by reason of the provisions of subsection (2) of that section, and that this was the position quite apart from section 57 of the Act so that the disqualification could not be said to be imposed under section 57. Various indications in the Act are pointed to as supporting this contention. Thus as showing that the respondent's disqualification was regarded by the Legislature as imposed not under section 57 but under section 39, attention is called to the actual wording of section 57 (4) which speaks of an offence under section 38 or section 39 for which a minimum period of disqualification is required to be imposed *under those sections*. This it is contended clearly regards a disqualification such as the respondent's to have been imposed under section 39 and not under section 57. Again, attention is directed to the introductory wording of subsections (2), (3) and (4) of section 57, which speaks of a person disqualified "by virtue of a conviction or order." Why, it is said, use such a phrase as this "by virtue of a conviction or order"? The con-

tention is that this points to two different and distinct classes of disqualification. A person disqualified by virtue of a conviction is a person whose disqualification takes place automatically upon his conviction under the specific provisions of the Act to which I have already referred. A person disqualified by an order, it is said, is a person whose conviction did not automatically entail the disqualification imposed upon him, but who was disqualified by the court in exercise of the power conferred by section 57 (1) of the Act. The disqualification imposed upon this latter class of person would be a disqualification imposed under section 57 within the meaning of the proviso: the disqualification imposed on the former class would, it is contended, not be imposed under section 57 but under the section which prescribed that the conviction should automatically entail the disqualification. Moreover, it is said that if it was intended that the power conferred on the court by the proviso to section 57 was to apply to cases of persons disqualified automatically by convictions under such sections as section 39, one would expect this to be made clear by specific provisions such as the provisions in sections 39 and 41 which empower the court to order for special reason that there should be no disqualification instead of the matter being left to be dealt with by an ambiguous provision in a general section. It is argued, too, that the view contended for by the appellant is in accord with what one might regard as the natural and probable intention of the Legislature. In cases where the court is given a discretion as to whether or not it should impose a disqualification it would, it is submitted, be natural enough to permit it to impose the disqualification only in regard to the type of vehicle with which the offence was committed, but that it would be much less natural to allow the court to limit a disqualification in this way for the more serious types of offence which Parliament had directed should involve automatic disqualification. Take for example, section 39. Disqualification for being drunk in charge of a motor vehicle is provided as much for the protection of the public as for the punishment of the offender: it would be more than odd, it is said, that a person automatically disqualified for being drunk when in charge of a motor car should, nevertheless, be at liberty to drive a motor bus or a motor lorry.

So far for the contentions of the appellant. I turn now to those put forward on behalf of the respondent. At the outset I cannot see that the respondent can derive any real support from the English decision of *Burrows v. Hall*[1], which was so much canvassed during the argu-

[1] [1950] 2 K.B. 476.

ment. That was a case in which there had been a conviction under section 35 of the Road Traffic Act, 1930, (which did not extend to Northern Ireland) for using a motor vehicle not insured against third-party risks. Subsection (2) of section 35 provided that a person convicted under the section should be disqualified from holding a driving licence for a period of twelve months, but went on to provide that a person disqualified by virtue of such a conviction should for the purposes of Part I of the Act be deemed to be disqualified by virtue of a conviction under the provisions of that Part. Now one of the sections contained in Part I of the Act, namely, section 6, enacted that any court before which a person was convicted of any criminal offence in connection with the driving of a motor vehicle might, in any case, except where otherwise expressly provided by Part I of the Act and should, when so required by Part I, order him to be disqualified from holding or obtaining a licence, but went on to provide that if the court thought fit any disqualification imposed under the section might be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed. The English Divisional Court held that the effect of section 35 (2) of the Act of 1930 was to make the provisions of Part I of the Act concerned with disqualification generally applicable to disqualification imposed under section 35 and that, accordingly, the court before which the accused person was convicted under section 35 was entitled to limit the disqualification as provided by section 6. The English court in that case based their decision on the fact that section 35 of the Act, which was the section which created the offence, expressly made the provisions of Part I of the Act in regard to disqualifications applicable to disqualifications under section 35. There is nothing at all, however, in section 39 of the Northern Ireland Act of 1955, making the terms of the first proviso to section 57 (1) applicable to disqualifications under section 39. Accordingly, *Burrows v. Hall*[1] does not seem to me to be an authority which can be relied upon as governing the point at issue in the present case.

The respondent, however, points out that while certain sections of the Act of 1955 provide that convictions for offences under those sections shall automatically entail disqualification for certain minimum periods the wording of section 57 appears to contemplate that all disqualifications, whether they are imposed under those sections or whether they are imposed in cases where disqualification is at the discretion of the convicting court, should be embodied in an order of

[1] [1950] 2 K.B. 476.

the court. He relies upon the fact that the terms of section 57 (1), which I have already quoted, not only enable the court to order a disqualification for any offence under the Act, but go on to provide that, where a section of the Act requires a convicted person to be disqualified for a minimum period, the court shall *order* him to be disqualified for a period which is not less than the minimum period. The respondent accordingly contends that all disqualifications, even when they are brought about automatically by a conviction under such sections as section 39, must be *imposed* on the convicted person by an order made in pursuance of the direction contained in section 57 (1). He points out that while such sections as section 39 of the Act fix a minimum period of disqualification they do not indicate how much longer a period may legitimately be imposed and contends that, if such sections as section 39 stood alone, there would be nothing in the Act to indicate how much longer a period of disqualification could legitimately be directed or, indeed, to sanction the imposition of any disqualification other than for the prescribed minimum period. It is said that to find any power to disqualify for a longer period than the minimum it is necessary to turn to sub-sections (1) and (8) of section 57 and, so the argument runs, it would be more than strange if a disqualification for (say) ten years for an offence under section 39 could be properly described as a disqualification under section 57 while a disqualification for the minimum period of twelve months could not properly be so described. The kernel of this argument is that the word *imposed* contained in section 57 must mean imposed by an order of the court, that section 57 (1) requires an order of the court to be made imposing the disqualification even when the Act directs that a conviction shall automatically entail a minimum period of disqualification, and that any disqualification found in a court order can properly be said to have been imposed under that section. As regards the phrase in section 57 (4) (a) "in the case of an "offence under section 38 or section 39 for which a minimum period "of disqualification is required to be imposed under those sections," this is explained as meaning "is required under the provisions of "those sections to be imposed". But according to the respondent's argument the actual imposing of the disqualification will be carried out by an order made in obedience to the provisions of section 57 (1).

Having read and re-read the relevant sections of the Act time and again in an endeavour to determine what the intention of the Legislature was upon the point at issue between the parties I confess that I have found the task a most baffling one. The wording of the Act gives

no clear guidance and the arguments which can be adduced on behalf of the appellant and of the respondent seem to me to be fairly evenly balanced. The statute is a penal one and, accordingly, I think that in the circumstances the court must take the course to which courts in England as well as in this jurisdiction have found themselves frequently driven in recent years when faced with the problem of construing ambiguous provisions contained in penal statutes and must decide in favour of the more lenient construction. I appreciate that the proviso to section 57 (1) of the Act of 1955, upon which the case turns, is not a provision imposing a disqualification but is one enabling the court to mitigate a disqualification imposed under other provisions of the Act. But just as sections imposing a penalty or disqualification must be interpreted strictly, so also a proviso, which has the effect of enabling the court to mitigate a penalty or disqualification, must be construed liberally: *Hutchinson v. Manchester Bury & Rossendale Railway Co.*[1], per Pollock C.B. Accordingly while still in doubt as to the intention of the Legislature, I agree that the question submitted in the case stated should be answered as proposed by the Lord Chief Justice. It only remains to observe that if, as we have now held, the first proviso to section 57 (1) confers upon the court a power to limit disqualification for offences under section 39 to the driving of vehicles of the same class or description as the vehicle in relation to which the offence was committed, it is a power which, in my opinion, ought to be exercised only in rare and exceptional circumstances.

And perhaps before finally leaving a case turning upon the first proviso to section 57 (1) of the Northern Ireland Act of 1955—which was obviously copied from the proviso to section 6 (1) of the English Act of 1930—it may be of interest to notice that section 29 (3) of the English Road Traffic Act, 1956, reads as follows: "In section six of "the Act of 1930 the proviso to subsection (1) (which empowers a "court to limit a driving disqualification to the driving of a motor "vehicle of the same class or description as the vehicle in which the "offence was committed) shall cease to have effect."

It is to be observed, however, that while this subsection (3) of section 29 of the Act of 1956 is expressed in general terms the other

[1] (1846) 15 M. & W. 314, 318.

subsections of section 29 are concerned solely with the offence under section 35 of the Act of 1930 of driving while uninsured.

Appeal dismissed.

Solicitor for the appellant: *Chief Crown Solicitor.*

Solicitors for the respondent: *B. Campbell & Co.*

J.P.

ECCLES v. MCBURNEY[1]

Animal—Dog—Worrying sheep—Right to shoot—Dogs Act (Northern Ireland), 1927 (17 *Geo.* 5, *c.* 3).

Civil bill—Case stated by Judge of Assize—No jurisdiction in Court of Appeal to send case back for further findings of fact—Civil Bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 *Vict. c.* 99), *s.* 35.

The defendant discovered two dogs barking and snapping at his sheep in his field. He shouted at the dogs which ran away, one of them going into another field where there were no sheep. The defendant pursued this dog into the other field and shot it dead.

In civil bill proceedings for damages for the shooting of the dog the defendant contended that the shooting was justified on the principles laid down in *Cresswell v. Sirl* [1948] 1 K.B. 241. It was found as a fact that if the defendant had not driven the dogs away one or both of them would have physically attacked the sheep, and further that a dog which has attacked sheep in a flock will return to attack sheep in the same flock.

On the hearing of a case stated by the judge of assize, on appeal from the county court judge, raising the question whether on the facts found the defendant had any answer in law to the plaintiff's claim—

Held, (i) that even if the facts found showed the defendant to have brought himself within the first proposition laid down in *Cresswell v. Sirl* (supra), namely, by showing that at the time of the shooting the dog was either (a) actually attacking the sheep, or (b) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; yet there were no findings of fact to satisfy the second proposition in that case, namely, that either (a) there was in fact no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack;

(ii) that there was no jurisdiction in the court to send the case back for further findings of fact.

Quaere whether the principles laid down in *Cresswell v. Sirl* (supra) are applicable in Northern Ireland having regard to the provisions of the Dogs Act (Northern Ireland), 1927.

CASE STATED by Sheil J. sitting as Judge of Assize on the hearing of a civil bill appeal.

The facts sufficiently appear in the headnote and in the judgment of Black L.J.

McSparran Q.C. and *McSparran* for the defendant and appellant. The shooting of the dog was justified. We rely on the principles laid

[1] In the Court of Appeal before Black and Curran L.JJ.: Jan. 19, 1959.

down by Scott L.J. in *Cresswell v. Sirl*[1]. As to the first proposition there laid down we say that it is satisfied by the finding in the case stated that a dog which has attacked sheep will renew the attack on those sheep.

[BLACK L.J.: Scott L.J. refers to the animals being *presently* in danger. What is the significance of that word?]

It is ambiguous, but we submit that it is clear that the danger need not be limited as to time to the transaction which constitutes the original attack.

As to the second proposition, we say that as a matter of common sense there was, on the facts, no practicable means of preventing a renewal of the attack, or that in the alternative the defendant acted reasonably in regarding the shooting as necessary for the protection of the sheep.

[BLACK L.J.: There is no finding to that effect in the case stated.]

[CURRAN L.J.: Scott L.J. says that the onus is on the defendant. If there is something material not set out in the case stated what is the position?]

In *Cresswell v. Sirl*[1] the case was sent back for further findings to be made.

[BLACK L.J.: Has this court the power to do that?]

A case stated by a judge of assize is a consultative case: *Foster v. Murphy*[2]. We submit that this court can send the case back to the judge with its opinion as to the point of law involved so that he can apply the law to the facts as he finds them.

[BLACK L.J.: That may be, but I have never heard of it being done. The power to deal with cases stated at quarter sessions is different from that under the Act of 1864, and there is express provision for sending cases back to quarter sessions.]

We do not rely on the provisions of the Dogs Act (Northern Ireland), 1927. That Act is applicable only where the dog is shot while actually attacking the animals, and the protection afforded by it would seem to be less than that afforded by the common law as laid down in *Cresswell v. Sirl*[1]. The Act appears to be based on the law as laid down in the older cases.

[1] [1948] 1 K.B. 241, 249

[2] [1940] N.I. 23.

Harrison Q.C. and *Ferguson* for the plaintiff and respondent were not called upon.

BLACK L.J.: The facts of this case were that on January 28, 1958, the defendant discovered two dogs belonging to the plaintiff in a field in which the defendant had some twelve sheep; the dogs were barking and snapping at the sheep; the defendant shouted at the dogs to drive them away from the sheep; one of the dogs ran away at once; the second dog did not just immediately go away but in a moment or so ran off into another field of the defendant in which there were no sheep. The defendant pursued this second dog and shot it dead in the last-mentioned field. It is found as a fact in the case stated that if the defendant had not chased the dogs away, one or both of them would have physically attacked the sheep, and it is also found, on the evidence of the Rev. R. J. McIlmoyle, a very well known sheep breeder, that a dog which has attacked sheep in a flock will return again to attack sheep in that flock. Although it is not expressly stated, I gather that this may be taken to be a finding that the dog which the defendant shot would, if not prevented, have returned to attack the sheep in this flock. The county court judge awarded the plaintiff the sum of £3, but the judge on appeal states that he thought this sum inadequate, and that if the plaintiff succeeds the decree should be increased to £7. This case has been stated at the request of the defendant for the opinion of this court as to whether on the facts found the defendant has any answer in law to the plaintiff's claim.

The reason why this matter is felt to be of importance is that there is some doubt as to the law on the point in Northern Ireland. Until recently it was considered that the law was that the owner of sheep was only entitled to shoot a dog which was actually attacking his sheep or going to attack them, a proposition which had been stated in a number of the older cases. One of these, which is very similar on its facts to the present case, although it was not referred to in argument, or in the court below, is *Wells v. Head*[1]. The headnote of that case is as follows: "The owner of sheep in a field which had been "worried by a dog, shot the dog when in another field at some distance "off:— Held, in an action by the owner of the dog, that the defendant "was not justified in the act of shooting, as it was not done in pro-"tection of his property."

The report, which is a short one, continues: "Action for shooting "the plaintiff's dog. It was proved, that the dog had worried some "sheep belonging to the defendant; but it appeared that he had left

[1] (1831) 4 C. & P. 568.

"the field in which the sheep were, had crossed an adjoining close, "and was in a third when the defendant shot him.

"Alderson, J. said, that whatever the provocation to shoot the dog "might be, yet the verdict must pass for the plaintiff, for it was clear "that the dog was not shot in protection of the defendant's property, "as it was after he had left the field in which the sheep were. But, "though there could not be a verdict for the defendant, the habits of "the dog might be considered in mitigation of damages. Verdict for "the plaintiff. Damages—one guinea".

That seems to have been accepted as the law right down to modern times. One finds that it was the view adopted by Molony J. in *Staveley v. Barrington*[1], and by the then Recorder of Belfast in *Brown v. Belfast Water Commissioners*[2], but the matter was recently considered by the Court of Appeal in England in *Cresswell v. Sirl*[3], the case referred to by Sheil J. in the case stated. There, the law was propounded in rather more liberal terms in the judgment of the court, which was delivered by Scott L.J. After discussing the earlier cases Scott L.J. proceeds as follows[4]: "We think the relevant rules "of law may be thus stated: (1) The onus is on the defendant to "justify the preventive measure of shooting the attacking dogs. "(2) He has, by proof, to establish two propositions, but each pro- "position may be established in either of two ways: *Proposition No.*1: "That at the time of shooting, the dog was either (a) actually.... "attacking the animals in question, or (b) if left at large would renew "the attack so that the animals would be left presently subject to real "and imminent danger unless renewal was prevented." It is difficult to know what precisely the Lord Justice had in mind when he used the word "presently", but I will assume, without so deciding, that in the present case Mr. McSparran was justified in submitting that the defendant had succeeded in establishing this first proposition. The second proposition is stated by Scott L.J. as follows: "*Proposition* "*No.* 2: That either (a) there was in fact no practicable means, other "than shooting, of stopping the present attack or preventing such "renewal, or (b) that the defendant, having regard to all the circum- "stances in which he found himself, acted reasonably in regarding the "shooting as necessary for the protection of the animals against "attack or renewed attack."

The defendant has accordingly to establish one or other of the

1 (1913) 47 I.L.T.R. 296.
2 Ibid. 153.
3 [1948] 1 K.B. 241.
4 Ibid. 249.

conditions set out under proposition No. 2, and this must obviously involve questions of fact. In order to succeed, therefore, the defendant must get the judge to find the facts in his favour on one of these points, but when one looks at the facts which have been found in the present case, as they appear from the case stated, one finds no finding of fact in relation to either point. This is not a matter for which any blame can be attached to the plaintiff; the case was submitted to the parties, and it was for the defendant, if he wished to have any further findings of fact inserted, to ask for them. One might be tempted to conclude, from the fact that no finding of fact in relation to the second proposition was asked for, that the defendant and his advisers considered that it would not be of much use to ask the judge to make such a finding, but whether that may be so or not, the fact remains that there is no such finding in the case stated; there are no facts there set out which could satisfy the second proposition stated by Scott L.J.

Accordingly, since the question which this court is asked is "Whether on the facts found the defendant has any answer in law to "the Plaintiff's claim," it seems to me that we must answer that question by saying that on the facts found he had no answer. It was suggested by Mr. McSparran that the case might be sent back to the judge, in the same way that *Cresswell v. Sirl*[1] was sent back to the county court in order that further findings of fact might be made, but an appeal to the Court of Appeal in England from a county court judge stands on a different footing from a case stated by a judge of assize in Northern Ireland, and I have never heard of such a case stated having been sent back in that way. Indeed, it would be manifestly unfair to do so in the present case, for the defendant has had the opportunity of considering the draft prepared by the judge, and allowed it to pass, perhaps, as I have suggested, because he had not much hope that the judge would be prepared to make the necessary findings of fact in his favour.

Anyone with experience of litigation in the county courts in Northern Ireland cannot fail to be keenly aware of the very considerable difficulties which farmers have in trying to protect their sheep from attacking dogs. It may be that the present case was intended to serve as a test case, but in the absence of a finding in the case stated that the defendant had succeeded in discharging the onus of establishing the second proposition set out in Scott L.J's. judgment in *Cresswell v. Sirl*[1] I cannot see how this court can answer in the

[1] [1948] 1 K.B. 241.

defendant's favour the question submitted for our decision by the learned judge.

So far as the case of *Cresswell v. Sirl*[1] is concerned, although this may be obiter, I would venture to say that the courts in Northern Ireland should be disposed to follow the principles laid down in that case rather than the more stringent rules to be extracted from the older cases. A difficulty arises however by reason of the provisions of the Dogs Act (Northern Ireland), 1927. I find it difficult to appreciate fully the effect of the provisions of that Act, but it was obviously drafted on the basis of the older decisions rather than the principles which have now been set out in *Cresswell v. Sirl*[1], and it may be a matter for further litigation to determine, if the Legislature does not intervene, what bearing those principles and the provisions of the Act of 1927 should have upon one another. In view of the difficulties raised by that Act, it seems to me that it might well be considered whether legislation should be introduced with a view to putting the law on an understandable basis.

As regards the question propounded in the case stated, my opinion is that our decision should be that on the facts found by the learned judge the defendant has not any answer in law to the plaintiff's claim.

CURRAN L.J.: I agree, and I do not think that there is anything I can usefully add.

Appeal dismissed.

Decree affirmed.

Solicitor for the appellant: *S. Cumming.*

Solicitors for the respondent: *Boal, Anderson & Co.*

J.P.

[1] [1948] 1 K.B. 241.

KERR v. MITCHELL AND ANOTHER[1]

Factories Acts—Baling machine being used on farm premises—Whether premises a "factory"—Dangerous machinery—Factories Act (Northern Ireland), 1938 (2 *Geo.* 6, *c.* 23), *ss.* 15, 157.

A agreed to sell to B a quantity of straw which he had in a shed on his farm and it was a term of the agreement that B should bring a baling machine to bale the straw on the farm. While the plaintiff, a farm labourer employed by A, was assisting in the baling operations he put his hand through a slot in the side of the machine in order to rescue a hen which had flown into the machine, and received severe injuries. The plaintiff sued both A and B for damages, alleging against each of them negligence and breach of statutory duty under section 15 of the Factories Act (Northern Ireland), 1938.

The trial judge ruled that there was no evidence of negligence against A, and the jury, in answer to questions submitted to them, found (a) that the part of the baler where the plaintiff was injured was a dangerous part of the machinery, and (b) that B had not been guilty of negligence in using the baler with the slot unguarded. The trial judge held that the Factories Act (Northern Ireland), 1938, did not apply to the premises, and having regard to the jury's findings he gave judgment for the defendants.

Held, by the Court of Appeal, (i) that, notwithstanding the finding that the machine was dangerous, the jury was entitled to find that B had not been negligent, and that on the evidence the trial judge was right in refusing to leave to the jury any question whether A had been negligent.

(ii) that although on a literal reading of section 157 of the Act of 1938 A's premises might fall within the definition of a factory contained in that section, yet neither the farm as a whole nor that part of it where the baling was being carried out constituted a factory for the purposes of the Act, and accordingly neither defendant was under any obligation under section 15 of the Act to fence securely any dangerous machinery.

Decision of Lord MacDermott L.C.J. affirmed.

Observations by Black L.J. on the test to be applied in determining whether machinery is dangerous for the purpose of section 15 of the Factories Act (Northern Ireland), 1938.

APPEAL from a judgment entered for the defendants in an action tried by Lord MacDermott L.C.J. with a jury.

The facts of the case are set out in the judgment of Black L.J.

Stewart Q.C. and *Little* for the plaintiff and appellant. We submit the learned trial judge should have submitted the question of the negligence of the first-named defendant to the jury. There was evidence upon which the jury could have found him negligent, either as

[1] In the Court of Appeal before Black and Curran L.JJ. and Sheil J.: Oct. 28, 29, 30, 1957; March 16, 1959.

occupier of the premises—see *London Graving Dock v. Horton*[1], per Lord Porter—or as the plaintiff's employer. At lowest, the position was that the facts give rise to a reasonable inference that one or both of the defendants were liable and the trial judge should have left the matter to the jury: see *Hummerstone v. Leary*[2].

The first question left to the jury was whether the machinery was dangerous, and we submit that the presence of that question would have misled the jury in considering the second question, whether the second-named defendants were negligent. The answer given to the second question is not consistent with the first, and we say it should be set aside.

The case is within the Factories Act (Northern Ireland), 1938, for on the facts admitted or proved at the trial either the whole farm, or alternatively that part of it where the baling machine was, would come within the precise terms of the definition of a factory set out in section 157 of the Act. *Nash v. Hollinshead*[3] is cited as an authority to the contrary, but we say the ratio decidendi of that case was that the premises were not a factory because nothing was being "adapted for "sale": see *Curtis v. Shinner*[4]. In any event, *Nash v. Hollinshead*[3] dealt with the position under the Factories and Workshops Act, 1878, which was narrower in its scope than the 1938 Act. [They also referred to *George v. Macdonald*[5], *Kinder v. Camberwell B.C.*[6]].

Nicholson Q.C. and *Harty* for the first-named defendant. Although our client, as employer, owed a duty to the plaintiff at common law, there was no evidence of negligence on his part. The machine was not owned by him, but had been brought to his premises by a reputable contractor. If the machine had been obviously dangerous, he might have been negligent in allowing the plaintiff to work at it, but the machine was a normal type of machine, and he was under no obligation to carry out an inspection of it. If he could have been liable at all, we submit that it could only have been on the basis of vicarious liability for the acts of the second-named defendants, whom the jury have found not to have been negligent. The duty at common law is a duty to take reasonable care to guard against foreseeable accidents, and it would have been quite unreasonable if the jury had found that a farmer should have foreseen and guarded against the risk of an accident such as happened in this case. [They referred to *Nicholls v. Austin (Leyton) Ltd.*[7], per Lord Wright.]

1 [1951] A.C. 737, 746.
2 [1921] 2 K.B. 664.
3 [1901] 1 Q.B. 700.
4 (1906) 95 L.T. 31.
5 (1901) 4 F. 190.
6 [1944] 2 All E.R. 315.
7 [1946] A.C. 493, 503.

The Factories Act has no application in this case. The principle of interpretation is that although the case may be within the literal meaning of the statute, the statute should not be applied to something clearly outside its general purview. That was the basis of the decision in *Nash v. Hollinshead*[1]. We submit that the terms of the Act make it clear that it was never intended that the Act should be applied to the temporary use of machinery on a farm. The processes referred to in section 157 suggest that some continuity in the operations was contemplated, and some of the provisions, such as those restricting Sunday working could never have been meant to apply to farms. Specific relaxations of the provisions as to hours of working are set out in sections 98 and 99 and it is inconceivable that, if farms were meant to be covered by the Act, there should have been no such provisions as to them. Arguments similar to those advanced by the plaintiff in this case were put forward and rejected in the case of *Wood v. London County Council*[2] where the premises in question were a hospital kitchen.

Another difficulty in the application of the Factories Act to this case is that of determining what constitutes the "factory." It can scarcely be the whole farm, but if not there is no way of defining its boundaries. It would also be difficult to say who is the "occupier" for the purpose of the Act. That term is not defined, though there is a reference to a person having a right of access or control and we say that if a lesser area than the whole farm constitutes a "factory," then the second defendants are the "occupier". The intention of the Act is to make the person in control responsible: see *Ramsay v. Mackey*[3], as referred to in *Cox v. Cutler & Sons Ltd.*[4], and *Smith v. Cammell Laird & Co. Ltd.*[5] per Lord Maugham. The first-named defendant did not own the machine, and had no control over it, and it would be strange if he was under a statutory obligation to fence it.

Jones Q.C. and *Blair* for the second-named defendants. The second question was not objected to by the plaintiff at the trial, nor was any objection made to the judge's summing up. The only ground therefore on which the jury's answer can be attacked is that it was unreasonable and contrary to the evidence, but we know of no case in which a verdict that a defendant was not negligent was set aside on that basis.

We adopt the first-named defendant's argument as to the applicability of the Factories Act generally. We would also refer to *Jones v. Richards*[6].

1 [1901] 1 Q.B. 700.
2 [1941] 2 K.B. 232.
3 (1904) 7 F. 106.
4 [1948] 2 All E.R. 665, 674.
5 [1940] A.C. 242.
6 [1955] 1 All E.R. 463.

If the Act does apply, we say it must apply to the farm as a whole, for there is no indication as to what should be included. [They referred to *Luttmann v. Imperial Chemical Industries Ltd.*[1] and *London Co-operative Society v. Southern Essex Assessment Committee.*[2]] Even if only a part of the farm constitutes a factory, we submit that it is the first-named defendant who is occupier. Whatever the area involved, it must include premises occupied by him—the shed, and the place outside it where the machine was drawn up and in these circumstances section 145 of the Act would apply. There cannot be more than one occupier for the purposes of the Act: see *Smith v. Cammell Laird*[3], per Lord Atkin and Lord Wright.

Stewart Q.C. replied.

Cur. adv. vult.

BLACK L.J.: This case comes before the court on appeal from a judgment in favour of the defendants on a trial by the Lord Chief Justice and a jury of an action in which the appellant sought to recover damages against the defendants for injuries sustained by him by reason of alleged negligence and breach of statutory duty on the part of both defendants.

The facts giving rise to the plaintiff's claim can be stated shortly. The plaintiff was a farm labourer in the employment of the defendant Mitchell. The defendants James McVeigh & Sons Limited (whom I shall simply call in this judgment "McVeighs") are a Belfast firm of produce merchants. Mitchell had sold to McVeighs a quantity of straw stacked in a shed on Mitchell's farm but it is said by McVeighs that the straw did not become their property until after it had been baled. However this may be, they admit that it was purchased by them for the purpose of resale in the course of their business as produce merchants. In order to bale the straw McVeighs brought to Mitchell's farm a baling machine which was driven by a belt from a tractor and drew it up at the open side of the shed in which the straw was stacked. A man from McVeighs was in charge of the machine but apparently Mitchell and the plaintiff were to help at the baling.

The baling machine was described in the evidence of Mr. Cunningham. The straw is put in to an opening at the top of the machine and comes down to where a ram moving back and forward horizontally and driven from the tractor compresses the straw into bales. Coupled

[1] [1955] 1 W.L.R. 980.
[2] [1942] 1 K.B. 53.
[3] [1940] A.C. at 256-8, 264.

to the ram head is a rod which operates a so-called "horse's head" the function of which is to thrust down the straw into the box where it will be pushed by the ram. This "horse's head" is not I think of importance for the present case. What is of importance is that in each of the side castings of the machine there is a slot measuring 3 inches by 18 inches. The 18 inch measurement is the horizontal measurement of this slot and the 3 inch measurement is its width from top to bottom. The ram and the connecting rod which drives it move backwards and forwards longitudinally inside the machine between these slots. There is nothing in the nature of a guard covering these slots and accordingly it is possible to insert an object less than 3 inches in thickness through one of the slots so as to come into contact with the ram.

At the time when the accident to the plaintiff occurred the actual process of baling had not in fact commenced though the machinery had been started up to see if the driving belt from the tractor was properly aligned. The plaintiff was then standing by and did not know what his particular job in connection with the baling was to be. Though the machinery had only been started to see if the belt was properly aligned a son of the defendant Mitchell had begun forking down straw. A hen had been nesting in the straw. The noise frightened her and she flew into the back of the baler and went down into the baling press. McVeighs' man, who was sitting on the tractor and was in control of the machinery, stopped the baler as quickly as he could in order to save the hen. The plaintiff was aware that the ram would not stop moving immediately the power had been cut off. When he thought that the machine had stopped and that the ram had come to a standstill he looked in and saw the hen between the ram and the straw, the ram being out, i.e. away from the bale at the time. Apparently there was some straw in the machine although the work had not really begun. The plaintiff then put his left arm through one of the slots at the side of the machine to grasp the hen. He could not of course have got the hen out through this aperture but meant to get her out through another opening. Unfortunately, when the plaintiff put his hand in through the slot, the ram moved—possibly for one of the reasons suggested by Mr. Cunningham in his evidence—and caught the plaintiff's arm causing him very serious injuries including a compound fracture of the left humerus and the severing of muscles of both the upper and the lower arm.

The plaintiff instituted the present action against Mitchell and McVeighs founding his claim on allegations of negligence and breach

of statutory duty against each of the defendants. In this statement of claim he set out a lengthy series of particulars of alleged negligence on the part of the defendants. As regards his claim on foot of breach of statutory duty he particularised the breach on which he relied as failure to fence a dangerous part of machinery contrary to section 15 of the Factories Act (Northern Ireland), 1938.

At the trial the learned Lord Chief Justice submitted five questions to the jury. These questions and the answers given to them by the jury were as follows:—

1. Was the part of the baler where the plaintiff was injured a dangerous part of the machinery?
   ANSWER: Yes.
2. If the answer to (1) is "Yes" were the defendants James McVeigh & Sons Ltd. guilty of negligence in using the baler at the time of the accident with the slot unguarded?
   ANSWER: No.
3. What are the total damages suffered by the plaintiff?
   ANSWER: £650.
4. Was the plaintiff guilty of contributory negligence?
   ANSWER: Yes.
5. If the answer to (4) is "Yes", to what sum is it just and equitable that the total damages found at (3) should be reduced, having regard to the plaintiff's share in the responsibility for the accident?
   ANSWER: £610.

It would appear that the first of these questions was primarily directed to the issue of breach of statutory duty imposed by the Factories Act. The second question was, of course, directed to the issue of negligence at common law. The learned Lord Chief Justice declined to leave a question as to whether Mitchell was guilty of negligence at common law on the ground that he could find no evidence of such negligence against Mitchell. He thought it well, in the event of the case going further, to take the view of the jury as to whether the machinery was dangerous within section 15 of the Factories Act and as to damages and contributory negligence. But having received the jury's verdict he gave judgment for the defendants being of opinion that the Factories Act did not apply.

The plaintiff in his notice of appeal challenges the verdict and judgment on several grounds. He claims that the finding of the jury in

answer to question 2, that McVeighs were not guilty of negligence in using the baler at the time of the accident with the slot unguarded, was unreasonable and contrary to the evidence and the weight of the evidence and that it ought to be set aside. With this part of the case I have no difficulty. I do not think that it could possibly be maintained that on the evidence the jury was bound to hold that a reasonably careful man owning McVeighs' machine would reasonably have anticipated that an accident such as that unfortunately sustained by the plaintiff might occur or that such a man would reasonably have been expected to take any precautions against the possibility of such an accident. I do not leave out of sight the fact that in answer to question 1 the jury found that the part of the baler where the plaintiff was injured was a dangerous part of the machinery. Question 1 was, however, as I have already said, concerned primarily with the defendants' obligations under section 15 of the Factories Act. One of the main objects of the Factories Act was to impose more stringent and more specific obligations upon the owners of machinery than they were under at common law, and it might well be that an owner of machinery might be responsible for an injury caused by neglect of his obligations under the Factories Act while not guilty of a default which would be held to amount to common law negligence. That this distinction exists is common everyday experience in the trial of Factories Act cases. Juries are asked separate questions as to whether defendants were guilty of negligence and whether they were guilty of breach of statutory duty, and it is far from unusual that they should answer one of these questions in favour of the defendants and the other in favour of the plaintiff. The existence of the distinction is clearly recognised in the oft quoted judgment of du Parcq J. in *Walker v. Bletchley Flettons Ltd.*[1], where he says: "It was rather "suggested by Mr. Sellers (and, in my view, it cannot be right) that, "in considering whether the defendants had been guilty of a breach of "their statutory duty to fence all dangerous parts of machinery, the "question was precisely the same as it would be if I were considering, "apart from this statute, whether the defendants had been negligent "in not fencing that machinery. Undoubtedly the questions are very "nearly the same, and the matters to be considered may be sometimes "very much the same, but there is clearly, in my view, a distinction to "be drawn." And a few lines later in his judgment the learned judge sets out the test to be applied in considering whether defendants have been guilty of negligence: "If the question were one put to a jury, "negligence or no negligence, the question one would ask oneself is:

[1] [1937] 1 All E.R. 170, 175.

"Did the employers omit to do something which a reasonable man "would have done?" To such a question in the present case I cannot see how a jury could be bound on the facts of the case to return an answer adverse to McVeighs or how it could be maintained that the jury's answer to question 2 exculpating McVeighs from negligence was either unreasonable or contrary to the evidence or to the weight of evidence.

The appellant also claims that there was evidence of negligence on the part of the defendant Mitchell proper to be submitted to the jury and that the Lord Chief Justice ought to have left a question to the jury as to whether Mitchell was guilty of negligence.

Even if on the evidence there was a case of negligence at common law against McVeighs—which personally I do not think there was—I cannot see how it can reasonably be suggested that there was any negligence at all on the part of Mitchell. The baler and tractor were owned by McVeighs and were apparently taken by them from farm to farm where straw purchased by them was to be baled. According to the appellant they had been at Mitchell's farm in previous seasons and he had seen the outfit working elsewhere. In cross-examination he stated that it was McVeighs' man who was in charge of the machine and conceded that Mr. Mitchell does not interfere with the machine and said that Mr. Mitchell has no responsibility for it and in answer to Mr. Nicholson's last question he admitted he could think of nothing that Mr. Mitchell did wrong.

Quite apart from these admissions of the appellant, which I can appreciate it would be unfair to hold too strongly against a farm labourer, I can see no evidence that Mitchell either did anything which a reasonably careful man in his position would not have done or that he neglected or omitted anything which a reasonably careful man in his position would not have neglected or omitted. I am therefore of opinion that the Lord Chief Justice acted properly in refusing to leave to the jury the question whether Mitchell was guilty of negligence. In any case the jury in answer to question 2 decided that McVeighs were not guilty of negligence. If this finding of the jury that McVeighs were not guilty of negligence is accepted—as it must be—it would seem to me to follow a fortiori that Mitchell could not be held to have been guilty of any negligence.

I turn now to the other head of the appellant's case, his claim that the accident was attributable to a breach of statutory duty on the part of the defendants. The statutory provision upon which he relies is section 15 (1) of the Factories Act (Northern Ireland), 1938, which,

following the wording of section 14 (1) of the English Factories Act of 1937, provides as follows: "Every dangerous part of any mach-"inery, other than prime movers and transmission machinery, shall "be securely fenced unless it is in such a position or of such con-"struction as to be as safe to every person employed or working on "the premises as it would be if securely fenced."

Two questions arise here. The first is whether the place where the appellant was injured was a factory within the meaning of the Act of 1938, for it has not been suggested that section 15 (1) of the Act applies to any machinery unless it is in a factory: see section 155 of the Act. And if it is held that the place where the appellant was injured was a factory the further question arises whether the particular part of the machine which injured the appellant was a dangerous part of machinery within the meaning of section 15. Now in ordinary parlance one would not describe the scene of the accident as a factory. The Act of 1938, however, contains in section 157 a definition of the word "factory" for the purposes of the Act. It provides that the expression "factory" means any premises in which or within the close or curtilage or precincts of which persons are employed in manual labour in any process for or incidental to a number of purposes including (inter alia) the adapting for sale of any article, being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control.

It was conceded at the trial by counsel on behalf of Mitchell that premises were premises where persons were manually employed, that the process of baling the straw constituted an adapting for sale, that the work was being carried on for gain and that Mitchell had a right of access. And I gather that counsel for McVeighs did not dissent from these admissions. Accordingly it would seem that on a literal reading of section 157 Mitchell's farm, or perhaps the portion of it where the tractor and baler were drawn up, would fall within this wider definition of factory. There is, however, to be found in the decisions of appellate tribunals in England a body of authority which indicates that on a consideration of the provisions of the Factories Acts as a whole certain types of premises, though seemingly within the strict wording of the definition, should not be held to be factories within the meaning of the Acts. As is said in more than one of the text books (e.g. Halsbury's Laws of England, 3rd ed. vol. 17, page 13 note (q)) the definition must be construed from a commonsense point of view.

The first and leading case, so far as I am aware, in which the applicability of a Factories Act to operations on a farm came for consideration before an appellate tribunal was *Nash v. Hollinshead*[1]. In that case the appellant had upon his farm a movable steam engine which was used for the purpose of threshing, chaff cutting and grinding meal. The meal was consumed as food by the stock on the farm and the appellant did not sell any of it. The respondent met with an accident when engaged in attending to the engine while it was being used for the purpose of grinding meal and claimed compensation under the Workmen's Compensation Act, 1897. He was only entitled to compensation under that Act if the place where he was employed was a "factory" within the meaning of the Factory and Workshop Act, 1878, in which the definition of factory which the court had to consider corresponded closely in its phraseology with the definition in section 157 of the Factories Act (Northern Ireland), 1938. The English Court of Appeal held that the respondent was not employed on, in or about a factory within the meaning given to that term by the Act of 1878. They arrived at this conclusion by two separate lines of reasoning. In the first place they held that inasmuch as the meal was not intended for sale but for feeding the stock on the farm the operation of grinding it was not by way of trade or for the purposes of gain, the purposes of gain being construed as meaning the purposes of direct gain, and in the second place from a consideration of the purview of the Act and a detailed examination of its provisions they concluded that the Legislature did not intend that it should be applicable to ordinary farming operations. *Nash v. Hollinshead*[1] was relied on in the argument in the series of cases known as *Bailey v. Potteries Electric Traction Co. Ltd.*[2]. Scrutton L.J. while expressing the opinion that it had not got very much to do with the cases then before the court, suggested that he was not disposed to accept that "for purposes of gain" in the definition was limited to direct gain but indicated that the reasoning on which the decision in *Nash v. Hollinshead*[1] was based which commended itself most to him was that the detailed provisions of the Factory Acts and the enumeration of specific factories showed that the Legislature in those Acts was not thinking of farming as a trade or of farms as factories. And in the more recent case of *Stanger v. Hendon Borough Council*[3], in which *Nash v. Hollinshead*[1] was again relied on in the argument, Somervell L.J. after quoting at length from Scrutton L.J's. judgment in *Bailey v. Potteries Electric Traction Co. Ltd*[2]. wound up by saying[4]:

[1] [1901] 1 Q.B. 700.
[2] [1931] 1 K.B. 385, 491-2, 496.
[3] [1948] 1 K.B. 571.
[4] Ibid. 578.

"I read that as an expression of opinion by this court that the ratio "decidendi in *Nash v. Hollinshead*[1] is that, looking at the Acts as a "whole, they were not intended to cover, and could not be construed "as covering farming, and do not contain the principle as stated by "A. L. Smith M.R. that gain means direct gain."

This passage which I have just read from Somervell L.J's. judgment in *Stanger v. Hendon Borough Council*[2] expresses the view as to the non-applicability of the Factories Acts to farms and farming which appears to be now accepted by the English Court of Appeal. That the principle of scrutinizing the whole of the Acts in order to determine whether they should be held to cover a certain type of premises is a legitimate one is corroborated by the reasoning in *Wood v. London County Council*[3]. The premises with which that case was concerned were the kitchen of a large mental hospital. These premises appeared to fall clearly within the wording of the definition of "factory" in the English Factories Act of 1937. But having scrutinized the provisions of the Act in detail as was done in *Nash v. Hollinshead*[1] the Court of Appeal held that the Legislature could not be regarded as having intended it to apply to such premises.

So far as I am aware there is no decision of any appellate court in Ireland as to whether the Factories Acts apply to farming. But the statutes in operation here follow those in operation in England so closely that the same considerations must apply in attempting to decide their applicability in either jurisdiction. And as was said by Holmes L.J. in *M'Cartan v. Belfast Harbour Commissioners*[4], and quoted and accepted as a principle to be followed by this court by Murphy L.J. in *Re Northern Ireland Road Transport Board and The Century Insurance Company Limited*[5]: "It is true that, although we are "not technically bound by decisions in the co-ordinate English Court, "we have been in the habit, in adjudicating on questions as to which "the law of the two countries is identical, to follow them. We hold "that uniformity of decision is so desirable that it is better, even when "we think the matter doubtful, to accept the authority of the English "Court, and leave error, if there be error, to be corrected by the "tribunal whose judgment is final on both sides of the Channel."

At the beginning of his judgment in *Nash v. Hollinshead*[6] A. L. Smith, M.R. says: "The question involved is whether a farmer, who

1 [1901] 1 Q.B. 700.
2 [1948] 1 K.B. 571
3 [1941] 2 K.B. 232.
4 [1910] 2 I.R. 470, 494.
5 [1941] N.I. 77, 107.
6 [1901] 1 Q.B. at 703.

"uses a steam-engine on his farm, as in the present case, carries on "the business of a 'non-textile factory' within the meaning of the "Factory and Workshop Act, 1878. I may say, without fear of "contradiction, that, before this case, it never entered into any one's "head to suppose that he did so. It is now suggested for the first time "that, ever since 1878, all the farmers in the United Kingdom who, "in the course of their business, have used a steam-engine, for the "purpose of grinding meal, or cutting chaff, or threshing out a rick "have been carrying on the business of non-textile factories." It would seem no less remarkable that in the fifty eight years since *Nash v. Hollinshead*[1] was decided, during which countless accidents must have happened through the use of machinery on farms, the authority of that case never seems to have been questioned by any court, and that in 1948 in *Stanger's* case[2] Somervell L.J. appears to have no doubt of its being an established authority for the proposition that looking at the Factories Acts as a whole they were not intended to cover farming and could not be construed as so doing. In *Nash v. Hollinshead*[3] Collins L.J. after observing that many of the provisions of the Act were of such a nature as it would be absurd to apply to every farming operation which might be carried on by means of steam or other mechanical power, goes on to say: "There is also the "further consideration, in addition to those arising from the context "of the Act, that the Legislature must have been aware of the fact "that farming operations were largely carried on by means of such "steam-engines and also that farming was one of the largest indust- "ries in the country; and, that being so, it would be very extra- "ordinary, if they had intended that the Factory and Workshop Act, "1878, should apply to it, that they should not have referred expressly "to it among the places specifically mentioned in the definition clause, "or introduced into the general words some expression that would "distinctly cover it without any straining of the language." These considerations, weighty in themselves, can it seems to me be pressed with all the greater weight at the present day now that the Factories Act code has been rewritten in the English Act of 1937 and the Northern Ireland Act of 1938 and the old enactments supplanted. When enacting the Acts of 1937 and 1938 the Imperial Parliament and the Parliament of Northern Ireland must be taken to have been aware of the existing state of the law regarding the non-applicability of the Factories Acts to farming according to the decision of the

[1] [1901] 1 Q.B. 700.
[2] [1948] 1 K.B. 571.
[3] [1901] 1 Q.B. at 706.

English Court of Appeal in *Nash v. Hollinshead*[1] as explained by Scrutton L.J. in *Bailey v. Potteries Electric Traction Co. Ltd.*[2], and in view of those decisions it would be more than extraordinary that those Legislatures should not have introduced some words into the definition sections of the 1937 and 1938 statutes if it was their intention that the decision in *Nash v. Hollinshead*[1] should be nullified and that the provisions of the Acts should apply when machinery was used in farming operations. And I may here add a small point, but one perhaps worth mentioning. It is difficult to see any reason for the mention of premises in which the business of flax scutching is carried on under head (xiv) in the list of premises specifically mentioned as included in the expression "factory" in section 157 of the Act of 1938 if premises in which the business of farming is carried on were intended to be covered by the general definition of "factory" at the beginning of the section.

In order to demonstrate the inapplicability of the provisions of the Act of 1938 to farming it is I think hardly necessary to go through the Act in detail and point out the provisions inapplicable to farms. This was done by A. L. Smith, M.R. in regard to the Act of 1878 in *Nash v. Hollinshead*[1] and a similar process was pursued with somewhat more elaboration by MacKinnon L.J. in *Wood v. London County Council*[3] in demonstrating that the Act of 1937 could not have been intended to apply to the kitchen of a large hospital. Suffice it to say that I am certain that any Northern Ireland farmer like the defendant Mitchell who used a machine on his farm for the cleaning or washing or the adapting for sale of any farm product would be greatly surprised if he were informed that he had to post on his farm the notices required by section 120 of the Act of 1938 and to keep a register containing the particulars prescribed by section 122 and to make the returns directed by section 124, and that failure to comply with the requirements of these sections would constitute an offence or a series of offences for which he could be prosecuted.

Accordingly, I am of opinion that the learned Lord Chief Justice was correct in law in deciding that the Factories Act (Northern Ireland), 1938, did not apply to the case. In so holding I wish to make it clear that I do not exclude the possibility that on a farm there might conceivably be set up—most probably under cover—something so elaborate that it would in itself constitute a factory. This, however, is not the present case which in its facts resembles closely the leading

[1] [1901] 1 Q.B. 700.
[2] [1931] 1 K.B. 585.
[3] [1941] 2 K.B. 232.

case of *Nash v. Hollinshead*[1]. The only significant distinction that I can discern between the cases is that in *Nash v. Hollinshead*[1] the farmer owned and operated the machine to grind his own meal whereas in the present case McVeighs owned and operated the machine to bale straw which they had bought from the farmer. But I conceive that the question of whether premises constitute a factory within the Act of 1938 must be decided by the physical circumstances of the case and cannot depend on whether or not the occupier himself owns and operates the machinery or whether it is owned by someone else and operated on the premises by arrangement with the occupier or upon whether the occupier still retains the ownership of the produce which is being processed or has arranged to sell it to the owner of the machinery.

As was pointed out by Curran L.J. during the argument, if the premises were held to be a factory within the Act of 1938, and if the jury's answer to question 1 could not be impugned, a very curious situation would seemingly arise. Under the provisions of section 157 (4) of the Act the party upon whom the statutory duties were imposed by the Act would apparently be Mitchell. He alone would be answerable to the appellant for breach of statutory duty and McVeighs would escape liability. This would manifestly appear to me to be unjust. I need only refer to *Jones v. Richards*[2], a case under the Threshing Machines Act, 1878, which did not apply to Ireland. In that case Barry J. held that both the owners of the machine and the farmer upon whose premises it was being operated were liable in damages to an employee of the owners of the machine for injury caused to him by reason of breach of statutory duty in failing to have the feeding mouth of the machine securely fenced but went on to decide that the farmer should be fully indemnified by the owners of the machine.

It follows from the conclusion at which I have arrived as to the non-applicability of the Factories Act, 1938, that this appeal should be dismissed. But even if the Act applied it seems to me at least doubtful whether the jury were justified in finding that the part of the baler where the appellant was injured was a dangerous part of the machinery within the meaning of that phrase in the section of the Act (section 15) which creates the statutory duty on which the appellant relies. It is well settled that a machine or part of a machine is not to be considered dangerous within the meaning of section 15 merely

[1] [1901] 1 Q.B. 700.

[2] [1955] 1 All E.R. 463.

because an accident has happened. As Scrutton L.J. observes in *Higgins v. Harrison*[1] every machine is dangerous if you go and put your hand into it whilst it is working. The test which the courts now apply in deciding whether a part of machinery is dangerous within the meaning of section 15 is laid down by du Parcq J. in *Walker v. Bletchley Flettons Ltd.*[2] and subsequently approved repeatedly by appellate courts, namely: "A part of machinery is dangerous if it is a "possible cause of injury to anybody acting in a way in which a "human being may be reasonably expected to act in circumstances "which may be reasonably expected to occur." Or as Lord Reid would prefer to say: "A part of machinery is dangerous if it is a "*reasonably foreseeable* cause of injury to anybody acting in a way in "which a human being may be reasonably expected to act in circum-"stances which may be reasonably expected to occur." (*John Summers & Sons Ltd. v. Frost*[3].) The point is thus put in a passage from the judgment of Lord Cooper in *Mitchell v. North British Rubber Co. Ltd.*[4], quoted by Lord Reid in his speech in *Frost's* case[3]. "The test" (sc. whether a part of machinery is "dangerous") "is "objective and impersonal. Is the part such in its character, and so "circumstanced in its position, exposure, method of operation and "the like, that in the ordinary course of human affairs danger may "reasonably be anticipated from its use unfenced, not only to the "prudent, alert and skilled operative intent upon his task, but also to "the careless or inattentive worker whose inadvertent or indolent "conduct may expose him to risk of injury or death from the un-"guarded part?" Accordingly when considering whether a part of machinery is dangerous one has to have regard not only to the conduct of workmen behaving reasonably but to any conduct whether stupid, thoughtless, or merely impulsive which can be reasonably foreseen. But it is not to be regarded as dangerous merely because an accident happened to a workman behaving in a way which one would not reasonably have foreseen or in circumstances which would not have reasonably been anticipated.

The question of whether a part of machinery is a possible cause, or a reasonably forseeable cause, of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur is a question of fact and degree which will in most cases be a question to be resolved by a jury. But cases may occur on the one hand where a part of

1 (1932) 25 B.W.C.C. 113, 119.
2 [1937] 1 All E.R. 170, 175.
3 [1955] A.C. 740, 766.
4 [1945] S.C.(J.) 69, 73.

machinery was so obviously dangerous that a finding by a jury that it was not dangerous would be unsustainable. And on the other hand cases may occur where the only reasonable finding on the facts would be that the part of the machinery which caused the injury was not a possible or reasonably forseeable cause of injury in any reasonably forseeable circumstances.

In view of the unusual and unexpected and one might with some justification say unforseeable occurrence which led up to the accident, the narrowness of the slot, and the fact that in the ordinary course the appellant would not have any reason to put his hand near the slot, I confess that I incline very much to the opinion that the accident happened in circumstances which could not reasonably have been expected to occur and that the part of the machine which caused the injury was not dangerous within the test laid down by du Parcq J. and Lord Reid. To put it at its highest in favour of the appellant, the question whether the jury's finding is sustainable that the part of the baler which caused the appellant's injury was a dangerous part of the machinery or whether this finding should be set aside seems to me a very borderline question. However, in view of the conclusion at which I have arrived regarding the non-applicability of the Factories Act I feel absolved from pronouncing definitely on this difficult point.

CURRAN L.J.: I concur.

SHEIL J.: I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the plaintiff: *Wm. Anderson & Burns.*

Solicitors for the first-named defendant: *Martin H. Turnbull & Co.*

Solicitors for the second-named defendants: *McKinty & Wright.*

J.P.

MAHON v. CLINGEN[1]

Motor vehicle—Disqualification from holding or obtaining a driving licence—Application for removal of disqualification—No jurisdiction to limit disqualification to vehicles of a particular class or description.—Road Traffic Act (Northern Ireland), 1955 (4 & 5 *Eliz.* 2, *c.* 27), *s.* 57 (4).

Where a person who has been disqualified from holding or obtaining a driving licence makes application pursuant to the provisions of section 57 (4) of the Road Traffic Act (Northern Ireland), 1955, for the removal of his disqualification, the court may either refuse the application or direct that the disqualification be removed in the manner specified in the subsection, but has no power to order that the disqualification be limited to vehicles of a particular class or description.

CASE STATED by the Resident Magistrate sitting at Lisbellaw Petty Sessions.

The defendant and respondent, David George Clingen, was convicted at Lisbellaw Petty Sessions on August 16, 1957, on a charge of driving a motor car while under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle, contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955, and was fined £15 and disqualified from holding or obtaining a licence to drive a motor vehicle for a period of twelve months. On appeal to the Court of Quarter Sessions held at Enniskillen on November 1, 1957, the conviction and disqualification were affirmed but the fine was reduced to £5.

On May 16, 1958, the defendant applied at Lisbellaw Petty Sessions for an order to remove the disqualification from holding or obtaining a licence, or in the alternative an order limiting such disqualification to the driving of a motor car or motor cycle. The application for an order removing the disqualification was not proceeded with at the hearing, but an order limiting the disqualification to the driving of a motor car or motor cycle was asked for on the grounds that the defendant had at all times an excellent character, that his conduct subsequent to the conviction was excellent and that a driving licence was essential to enable him to drive a tractor for the proper working of his own and his father's agricultural holdings. For the complainant and appellant it was contended that the court had no jurisdiction to vary the order or limit the disqualification. The resident magistrate held that he had jurisdiction to make the order sought and accordingly made an order limiting the disqualification imposed to private

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black L.J.: Dec. 11, 1958.

motor cars, but at the request of the complainant and appellant he stated this case for the Court of Appeal raising the question whether he had jurisdiction to make the order.

Nicholson Q.C. and *McDermott* for the complainant and appellant.

The defendant and respondent did not appear and was not represented.

LORD MACDERMOTT L.C.J.: In this case the defendant and respondent was convicted at Lisbellaw Petty Sessions on August 16, 1957, on a charge of driving a motor car while under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle, contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955. He was fined the sum of £15, and it was further ordered that he be disqualified from holding or obtaining a licence to drive a motor vehicle for the period of twelve months from August 16, 1957. Having regard to the terms of subsection (2) of section 39 that period of disqualification was the minimum period of disqualification for the offence of which the defendant was convicted.

The defendant appealed against his conviction to Quarter Sessions at Enniskillen, and on November 1, 1957, the Chairman of Quarter Sessions affirmed the conviction, but reduced the fine to one of £5. He also affirmed the order for disqualification which had been made at petty sessions. At Lisbellaw Petty Sessions on May 16, 1958—less than one year after the original conviction—the defendant applied to the magistrate for an order to have his disqualification removed, or, in the alternative, for an order that, without the disqualification being removed, it should be limited to the driving of a motor car and motor cycle. When this application came before the court the claim to have the disqualification removed was not proceeded with. No objection was raised on the merits to the claim to have the disqualification restricted, but the prosecutor questioned the jurisdiction of the court to make the order sought on two grounds: (1) that the application was premature, and (2) that neither under section 57 (4) of the Act of 1955 nor under any other enactment had the court to which the application was made any power to order that the disqualification be limited to vehicles of a particular type or description.

The first of these points related mainly to the claim to have the disqualification removed and, in view of the abandonment of that claim, need not be pursued.

As respects the second point, the application seems to have been made on the basis that the court, when dealing with an application

under subsection (4) of section 57, had the same powers as those conferred by subsection (1) of that section, the first proviso of which enacts that "if the court thinks fit, any disqualification imposed under "this section may be limited to the driving of a motor vehicle of the "same class or description as the vehicle in relation to which the "offence was committed." It is quite clear that this provision confers a power on the court which convicts, but it is now contended that the same power may be exercised by the court to which an application under subsection (4) is subsequently made. When one reads that subsection, however, it is plain that on such an application the court can only do one of two things—it can refuse the application or it can remove the disqualification as from a date fixed in the manner specified in the subsection; it has no jurisdiction to do what a court before which a person has been convicted may do, namely, to confine the disqualification to the same class or description of vehicle as that in respect of which the offence was committed.

It was also submitted, on behalf of the respondent, that the power conferred by the first proviso to section 57 (1) was not confined to the convicting court. This is really putting the previous contention in a wider form and it is equally untenable. The court mentioned in the proviso is the court already described in the subsection as "any "court before whom a person is convicted."

For these reasons I am of opinion and hold that the order appealed against is bad, and that the question asked in the case stated must be answered in the negative.

BLACK L.J.: I agree.

Appeal allowed.

Solicitor for the appellant: *Chief Crown Solicitor.*

J.P.

KISSACK AND OTHERS (TRADING AS "ULSTER FAT-STOCK CO.") v. BALLYMENA BOROUGH COUNCIL AND ANOTHER[1]

Public health—Slaughter-houses—Application to Ministry of Agriculture for licence to slaughter—Provision that licence shall not issue "unless the "application is made with the approval (which shall not be unreasonably "withheld) of the local authority"—Whether approval unreasonably withheld—Onus of proof—Slaughter-houses Act (Northern Ireland), 1953 (2 Eliz. 2, c. 21), s. 1.

Section 1 (1) of the Slaughter-houses Act (Northern Ireland), 1953, empowers the Ministry of Agriculture to issue licences in respect of slaughter-houses, and subsection (3) of that section provides that the Ministry "shall "not issue a licence unless the application is made with the approval (which "shall not be unreasonably withheld) of the local authority in whose area the "premises are situate."

In a case where the local authority had refused its approval to an application for a licence it was *held*, (i) that in such circumstances the onus is on the applicant to establish that the local authority has acted unreasonably in withholding approval and not on the local authority to establish that it has acted reasonably in so doing; (ii) that the onus could be discharged only by showing that the decision of the local authority was unreasonable in the sense that it was a decision which no reasonable body could have come to, and it was not sufficient to induce the court to find that the decision was on balance unreasonable in all the circumstances; (iii) that the fact that the local authority after conferring with other bodies or persons accepted the view of some other body or person was no evidence that the decision was unreasonable providing it was clear that the ultimate decision was the decision of the local authority arrived at upon consideration; (iv) that the failure of the local authority to supply the applicant with reasons for its decision was not of itself evidence that the decision was unreasonable.

ORIGINATING SUMMONS.

In 1954 the plaintiffs obtained a licence to enable them to slaughter animals for the export trade in premises which they had acquired in Ballymena. In 1957 the plaintiffs, finding themselves faced with certain difficulties in regard to the disposal of meat, wished to have an open licence to slaughter animals, that is to say, a licence which did not debar them from slaughtering animals the carcases of which could be used for consumption in Northern Ireland. Accordingly on March 25, 1957, the plaintiffs made application to the Ministry of Agriculture "for permission to sell in Ballymena and elsewhere in "Northern Ireland, carcases which have been slaughtered on our "premises". This application was treated by all parties and by the

[1] In the Chancery Division before McVeigh J.: Nov. 5, 6, Dec. 4, 1958.

court as an application for a licence pursuant to section 1 of the Slaughter-houses Act (Northern Ireland), 1953[1]. On April 1, 1957, the plaintiffs informed the Ballymena Borough Council in writing that they had made application to the Ministry, set out the plaintiffs' difficulties in carrying on their business without the licence applied for, and sought to enlist the co-operation of the Borough Council. This communication was treated by all parties and by the court as an application by the plaintiffs for the approval of the Council pursuant to section 1 (3) (a) of the Act of 1953. The Borough Council referred the application to its Public Health Committee, which appointed a sub-committee to deal with the matter and report back. This sub-committee considered the matter and conferred with its officers, with representatives of the Ministries of Health and Agriculture and with officers of the County Health Committee. The Public Health Committee reported on July 9, 1957, recommending the Borough Council not to give approval. On the same day at a special meeting of the Council it was unanimously resolved not to give approval to the application and the plaintiffs were immediately so informed.

On December 31, 1957, the plaintiffs renewed their application for the Borough Council's approval and asked the Council, in the event of refusal, to state the reasons for so refusing. The Council adhered to its decision and so replied to the plaintiffs, but did not state any reasons for the decision previously given. On January 31, 1958, the plaintiffs again asked for the reasons, but none were given by the Council.

The plaintiffs took out this originating summons for the determination of a number of questions, including the question "Whether "in the events which have happened Ballymena Borough Council has "unreasonably withheld its approval in respect of the plaintiffs' "application to the Ministry of Agriculture for 'home kill' extension "to its existing export licence under the Slaughter-houses Act "(Northern Ireland), 1953."

The case is reported only on the point of the onus of proof on an issue raising the question whether the approval of the local authority had been unreasonably withheld.

[1] Slaughter-houses Act (Northern Ireland), 1953, s. 1: "(1) The Ministry of "Agriculture.... may issue licences "in respect of slaughter-houses, sub-"ject to such conditions as may be "prescribed including (but without "prejudice to the generality of the "foregoing words) conditions as to "the kind or kinds of animal which "may be slaughtered in any slaughter-"house.... (3) The Ministry, on "receiving an application for a "licence—(a) shall not issue a licence "unless the application is made with "the approval (which shall not be "unreasonably withheld) of the local "authority in whose area the pre-"mises are situate in respect of which "the application is made;...."

Harrison Q.C. and *Rowland* for the plaintiffs.

Lowry Q.C. and *Watt* for the Ballymena Borough Council.

Nicholson Q.C. and *McConnell* for the Ministry of Agriculture for Northern Ireland.

Cur. adv. vult.

McVeigh J. stated the facts and continued: The first question in the summons, and one which is really on the threshold of the case, raises the issue arising under section 1 (3) of the Slaughter-houses Act (Northern Ireland). 1953, namely, whether on the facts disclosed in the affidavits in this case, and the documents exhibited thereto, it has been established to the satisfaction of the court that the Council "unreasonably withheld" its approval to the application made to the Ministry for the issue of a licence. There can, I think, be little doubt that the onus of establishing that the Council acted unreasonably lies on the plaintiffs. It is clearly established in the cases of landlord and tenant, where the question of whether a landlord has unreasonably withheld his consent has arisen, that the onus is on the tenant to show this and is not on the landlord to prove that he was justified in withholding it: see Halsbury's Laws of England. 3rd ed. vol. 23, p. 634, paragraph 1340; Black J. in *Hervey-MacLeay & Ors. v. Patton*[1]; *In re Town Investments Ltd.*[2]; *Berry Ltd. v. Royal Bank of Scotland*[3]. It seems to me that the principle thus shortly stated can well be applied by analogy to the question under consideration and it can be said that the onus of showing that the Council unreasonably withheld approval lies on the plaintiffs. Admittedly, the words in this case are contained in a statute and not in a lease or tenancy agreement, and no case was cited to me in which the court considered the meaning of such words in a statute, but I think the principle stated as to onus can be applied in this case. Counsel, however, did cite cases which dealt with the test to be applied where local authorities are required to exercise discretionary powers, and in such cases it has been considered relevant to notice that, as is the case here, no appeal is given by the statute against a refusal of consent by the Council, and that the decision of the Council in granting or withholding consent is not a judicial or quasi-judicial act. The court accordingly must be careful to avoid treating this matter as if it were an appeal from the decision of the local authority: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*[4].

[1] [1946] N.I. 118, 122.
[2] [1954] Ch. 301.
[3] [1949] 1 All E.R. 706, 708.
[4] [1948] 1 K.B. 223, 228.

Both the plaintiffs and the Council relied upon various portions of the judgment of Lord Greene in that case. Mr. Harrison, however, for the plaintiffs argued that the test applied in that case was that those who challenged the decision of the local authority were required to show that it was not only unreasonable but as he put it "utterly "unreasonable". Such he submitted was not the test in section 1 (3) (a) of the Slaughter-houses Act. His argument was that the plaintiffs had no greater onus than to satisfy the court that the Council was "on "balance unreasonable in the circumstances"; there must be a weighing and finding on balance of the various factors, he argued.

I do not myself think that the matter can be better put than as it is set out by the Master of the Rolls in the case referred to above where he says[1]: "I think Mr. Gallop in the end agreed that his proposition "that the decision of the local authority can be upset if it is proved to "be unreasonable, really meant that it must be proved to be un- "reasonable in the sense that the court considers it to be a decision "that no reasonable body could have come to. It is not what the court "considers unreasonable, a different thing altogether. If it is what the "court considers unreasonable, the court may very well have different "views to that of a local authority on matters of high public policy of "this kind..... The effect of the legislation is not to set up the court "as an arbiter of the correctness of one view over another. It is the "local authority that are set in that position and, provided they "act....within the four corners of their jurisdiction, this court, in my "opinion, cannot interfere." A person entrusted with a discretion in coming to his decision must, and these words can be applied to the Council, again to quote Lord Greene[2], "direct himself properly in "law. He must call his own attention to the matters which he is bound "to consider. He must exclude from his consideration matters which "are irrelevant to what he has to consider. If he does not obey those "rules, he may truly be said....to be acting 'unreasonably'. Similarly, "there may be something so absurd that no sensible person could ever "dream that it lay within the powers...." Then he gives the example of dismissing a teacher because she had red hair which he says is unreasonable in one sense, but may be also taking into consideration extraneous matters. In fact as Lord Greene says[3] "all these things "tend to run into one another". See to the same effect the opinion of Lord Macmillan in *Fraser v. Minister of National Revenue*[4].

1 [1948] 1 K.B. at 230.
2 Ibid. 229.
3 Ibid.
4 [1949] A.C. 24, 36.

[His Lordship then dealt with arguments as to the validity of regulation 5 (4) of the Slaughter-houses (Licensing) Regulations, (Northern Ireland), 1955, a point not material to this report, and continued:] Again, it was argued by the plaintiffs that the decision must be that of the Council and not that of the Ministry or the Ministry of Health. Indeed, counsel went so far as to argue that the Council were not entitled to take the Ministry's view and adopt it as their own. I think this latter sentence goes too far, for if the Council consider a point of view or a number of points of view and after due consideration accept one, whether it be that of the Ministry or some other body or person, then it is not necessarily bad for that reason only. I should say that counsel for the plaintiffs did concede, and properly as I think, that there could be no objection to the Council conferring with all or any of the various persons or bodies interested (and it may well be that the power to confer is even wider than that), but what is contended for, and with this I agree, is that once the conferring has taken place the decision must be that of the Council. Support for this view is to be found in the *Associated Picture Houses* case[1].

As to the argument that the decision was not that of the Council but the Ministry's, I am not satisfied on the available evidence that such was the case; indeed, there is nothing in the plaintiffs' affidavit or the exhibits thereto which, in my opinion, would justify the court in concluding that the decision in this case was other than that of the Council. It was contended that the court was left in the position that it could not say how much the Council was influenced by the attitude of the Ministry of Agriculture and the Ministry of Health. Assuming that this was the case I do not think it is sufficient for the plaintiffs' case to leave the matter there. It seems to me on a matter like this that the evidence that they produce would have to satisfy the court that the Council did not in fact make its own decision and, in my view, the evidence falls short of that. Furthermore, this being an originating summons and the evidence having been given on affidavits I can find no good reason for rejecting the sworn evidence of the Council's Town Clerk given in paragraph 9 of his affidavit in which he makes it clear that the Council arrived at their own decision after due consideration, and I accept that they exercised what is referred to in the *Associated Picture Houses* case[2] as "a real discretion".

It was also contended by the plaintiffs that the failure to give reasons, especially after two requests, was itself a demonstration that

[1] [1948] 1 K.B. at 228. [2] Ibid.

the decision was unreasonable. So far as this argument is concerned there is no statutory obligation placed upon local authorities to set out their reasons, such as, for example, is contained in the Planning (General Interim Development) Order (Northern Ireland), 1944 (S.R. & O. 1944, No. 58), regulation 12, which provides that the authority shall state the reasons for its decision in writing. In a matter of this nature one might have expected such a provision but none is enacted in the Act, and the only way in which an interested party can see the proceedings of the Council on such a matter is to inspect the minutes of the Council and its committes. A member of the public is also permitted to be present at a Council meeting, but not at a committee meeting. Even if it is thought that reasons should be given as a matter of discretion that does not, in my view, establish the proposition that failure to give reasons is a demonstration of unreasonableness, but what can be said, and there is authority for this, is that failure to give reasons make it easier to imply that the withholding of the approval was unreasonable: *Berry Ltd. v. Royal Bank of Scotland*[1].

[His Lordship then proceeded to deal with other arguments directed to show that the consent had been unreasonably withheld, and with the other questions raised by the summons.]

Solicitors for the plaintiffs: *J. & A. Caruth & Bamber.*

Solicitor for the Ballymena Borough Council: *James Ballentine.*

Solicitor for the Ministry of Agriculture: *Chief Crown Solicitor.*

J.P.

[1] [1949] 1 K.B. 619, 623.

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . APPELLANTS;

AND

ULSTER FARMERS' MART CO. LTD. . . RESPONDENT.

ULSTER FARMERS' MART CO. LTD. . . APPELLANT;

AND

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . RESPONDENTS.[1]

Market—Disturbance—Rival market—Purchase outside—Market in live pigs and pig carcases—Scheme between Ministry and co-operative society whereby live pigs and pig carcases sent to society's premises—Whether rival market—Object of scheme not the evasion of tolls—Whether any other form of disturbance.

The respondent company was the owner of the market place and market rights at Enniskillen, in the county of Fermanagh, Northern Ireland. The company's rights as market owner extended to numerous commodities including live pigs for slaughter of bacon weight and pig carcases. Prior to 1934 the market in pigs was confined to carcases. In 1933 an organisation called "the Pigs Marketing Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area. In 1940 the Ministry of Agriculture for Northern Ireland became the sole purchaser of live pigs for slaughter, and also the sole lawful buyer of pig carcases under the provisions of the Pig (Sales) (Northern Ireland) Order, 1940, which, however, authorised the Ministry to licence bacon curers to buy carcases themselves. The appellant society and other bacon curers were so licensed by the Ministry and they attended the market at Enniskillen and bought carcases there up to July 15, 1948. Before that date the society had no abattoir of its own, but brought certain live pigs by arrangement with the Ministry to the then market owner's abattoir for slaughter. This abattoir was closed down in 1947 and was not purchased by the company when it acquired the market rights from the former market owner in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. In 1946 the society obtained permission from the Ministry to

[1] In the House of Lords: Present—Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow; April 20, 21, 22, 23, 27; May 14, 1959.

The report of this case is, by kind permission of the Incorporated Council of Law Reporting for England and Wales, taken from the report in volume 2 of the Weekly Law Reports, 1959.

build an abattoir of its own, and the Ministry undertook to use the society's premises at Enniskillen as the principal collecting centre for County Fermanagh to which producers could bring live pigs which they had for sale. On July 19, 1948, the society's new premises were opened and the new scheme, following an advertisement in the local press, came into operation, under which live pigs bought by the Ministry were transported to the society's abattoir either at a subsidised rate or at the producer's own expense, and pigs killed on the farms were accepted by the society to be delivered at the producer's expense. After July 19, 1948, neither the society nor the Ministry had attended at the company's market and no person attending there had been able to sell pigs of bacon weight by reason of the absence of the society and the Ministry, or to sell pig carcases because of the absence of all persons authorised to purchase. Further, since that date, the society and the Ministry had ceased to pay the market owner any sum for or in lieu of tolls, and the company's claim for tolls in respect of pigs passing through the society's premises had been met by the plea that no such tolls were payable.

In an action by the company against the society, the Ministry and others, for alleged disturbance of its market rights by levying a rival market and otherwise:—

Held, (1) that there was no levying of a rival market as the society's premises did not provide facilities for a concourse of buyers and sellers which was the essential feature of such a market.

Great Eastern Railway Co. v. Goldsmid (1884) 9 App. Cas. 927, and observations of Chatterton V.-C. in *Downshire v. O'Brien* (1887) 19 L.R.Ir. 380, 390 applied.

(2) That there was no other actionable form of disturbance, for it could not be suggested in the circumstances that the object of the scheme was to evade the payment of toll. A sale outside the market which had or might have the effect of depriving the market owner of toll or some other advantage was an actionable disturbance only if the person selling took or sought to take the benefit of the market; accordingly, the claim failed.

Decision of the Court of Appeal in Northern Ireland reversed in part.

APPEAL and CROSS-APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J., Black L.J. and Sheil J.)[1].

This was an appeal from the order of the Court of Appeal in Northern Ireland dated May 15, 1958, insofar as it allowed the appeal of the respondent, the Ulster Farmers' Mart Co. Ltd., from the judgment and order of the trial judge, Curran L.J., dated February 22, 1957, in an action wherein the appellants, the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland and others (not parties to this appeal) were defendants and the respondent was plaintiff and insofar as the Court of Appeal by its order directed judgment in favour of the respondent in the action and directed

[1] [1958] N.I. 78.

certain inquiries as to damages and restricted the first named appellant from purchasing certain commodities at its premises in Enniskillen without the permission of the respondent. By petition of cross-appeal the respondent sought to have set aside those portions of the judgment of the trial judge which the Court of Appeal affirmed in favour of the appellants. The issue in this appeal was whether or not the activities of the appellants as established in the action were, and continued to be, an actionable interference with the respondent's market rights. The commodities in question in these proceedings were live pigs for slaughter (of bacon weight) and pig carcases for manufacture into bacon.

The facts are set out in the opinion of Viscount Simonds.

C. Nicholson Q.C., E. W. Jones Q.C., R. L. E. Lowry Q.C. and *J. C. MacDermott* (of the Bar of Northern Ireland) for the appellants.

W. F. Patton Q.C., J. A. Brown Q.C. and *B. Kelly Q.C.* (of the Bar of Northern Ireland) for the respondent.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Fearon v. Mitchell*[1]; *Mayor of Dorchester v. Ensor*[2]; *Stretch v. White*[3]; *Hopkins v. Great Northern Railway*[4]; *McCutcheon v. Carney*[5]; *In re Islington Market Bill*[6]; *London (Mayor of) v. Low*[7]; *Manchester Corporation v. Lyons*[8]; *Yard v. Ford*[9]; *Midleton v. Power*[10]; *Cork Corporation v. Shinkwin*[11]; *Bailiffs of Tewkesbury v. Diston*[12]; *Birmingham Corporation v. Foster*[13]; *Central Control Board v. Cannon Brewery Co.*[14].

Their Lordships took time for consideration.

1959. May 14. VISCOUNT SIMONDS. My Lords, in June 1947 the respondents Ulster Farmers' Mart Co. Ltd., whom I will call "the "respondents," became possessed of the exclusive right in fee simple by letters patent dated respectively May 28 in the tenth year of the reign of King James I and February 20 in the fifty-third year of the reign of King George III to hold markets and fairs in or at Enniskillen in the county of Fermanagh and to exercise all the rights set forth in the said letters patent. And they have at all material times held twelve fairs in every year and a market each Tuesday and Thursday

1 (1872) L.R. 7 Q.B. 690.
2 (1869) L.R. 4 Exch. 335.
3 (1861) 25 J.P. 485.
4 (1877) 2 Q.B.D. 224.
5 [1938] Ir. Jur. Rep. 73.
6 (1835) 3 Cl. & Fin. 513.
7 (1879) 49 L.J.Q.B. 144.
8 (1882) 22 Ch.D. 287.
9 (1670) 2 Saund. 172.
10 (1886) 19 L.R. Ir. 1.
11 (1825) Sm. & Bat. 395.
12 (1805) 6 East 438.
13 (1894) 70 L.T. 371; 10 T.L.R. 309.
14 [1919] A.C. 744.

in every week in exercise of the rights conferred by the said letters patent and of rights exercised by them and their predecessors in title from time immemorial or conferred by letters patent which have been lost or destroyed by accident. This statement of relevant fact I take from an agreed statement of facts in the action, out of which this appeal arises, and I do not think it necessary to examine further the origin or nature of the franchise except in one respect with which I will deal hereafter. It is, however, proper to mention that in the original grant there appeared a provision which the Lord Chief Justice (Lord MacDermott) called "the prohibition." It is a peculiar provision such as I do not remember to have seen before either in the grant of a franchise of market or elsewhere and it was at one time thought to have some importance, but at the hearing of this appeal it faded out and I will say no more about it.

Such being their market rights on December 19, 1949, the respondents, being aggrieved by the transactions to which I will presently refer, issued a writ against the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland (whom I will call respectively "the society," "the Minister" and "the Ministry") and certain other persons and bodies, who are not parties to this appeal, claiming a declaration in respect of their market rights, a declaration that the respondents had disturbed them in their said rights by the levying of a rival market and otherwise, damages for such disturbance and the appropriate injunctions and in addition damages for conspiracy.

Before I come to the circumstance which immediately gave rise to the action, namely, the opening of a new modern abattoir and the establishment of a live pig collecting centre at the society's factory in Enniskillen on July 15, 1948, I must state a few facts which are not in dispute.

The respondents' market rights extended to numerous commodities but this case is concerned with only two of them, live pigs for slaughter of bacon weight and pig carcases. The first of these was not sold in the market or, it was said, anywhere in Northern Ireland, before 1934, and it was suggested that it was not a commodity to which market rights extended. This view was not accepted by Curran J. who tried the case, or by the Court of Appeal and I see no reason to differ from them. Up to 1934 therefore the market (so far as relevant) was a dead

pig or carcase market and was held every week on Tuesdays only. Live pigs were sold as stores at the monthly fairs.

In the year 1933 an organisation called "the Pigs Marketing Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area.

On January 15, 1940, the Ministry, as agent for the Ministry of Food under and by virtue of the provisions of the Pig (Sales) (Northern Ireland) Order (being S.R. & O. No. 39 of 1940 made under the authority of regulation 55 of the Defence Regulations, 1939), became the only person authorised to purchase live pigs for slaughter in Northern Ireland, thus succeeding to the Pig Marketing Board's monopoly. By virtue of the same Order it also became the sole lawful buyer of pig carcases but was authorised to license bacon curers to buy carcases for themselves. It did so license the society and other bacon curers who attended the carcase market on Tuesdays and bought carcases there. This was until July 1948. It had in the meantime been enacted by S.R. & O. No. 1080 of 1947 (made under the authority of the same Defence Regulation) that no person might slaughter a pig for manufacture to bacon except for sale to a licensed curer.

I must now say a few words about the position of the society. It was at all material times a licensed bacon curer but it had before July 1948 no abattoir of its own. By arrangement with the Ministry it brought live pigs to the then market owner's abattoir for slaughter. This abattoir was closed down in the year 1947 and was not purchased by the respondents when they acquired the market rights in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, the Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. It has not been suggested that the rights of the parties were in any way affected by these payments.

I come now to the year 1948, reminding your Lordships that up to that time the carcase market was still active though the society, mainly if not entirely, made its purchases outside and had the carcases taken direct to its own premises. In 1948 a scheme (a word that I use in no sinister sense) which had for long been under con-

sideration by the Ministry and the society was brought into operation. I can best describe the salient features of this scheme by a citation from the judgment of the Lord Chief Justice, to whom the House is indebted for a clear and exhaustive exposition of the facts. This is what he says: "The outcome of the negotiations between the society "and the Ministry was that the necessary alterations and extensions "were made at the society's premises [i.e., the building of an abattoir "and enlarged storage space with refrigeration and modern mach-"inery] and the Ministry then transferred its live pig collecting centre "there. The new project, as I shall call it, came into operation on July "19, 1948, following an advertisement in the local press inserted with "the knowledge and approval of the Ministry.

"This advertisement announced the opening of the society's new "abattoir and that the Ministry's live pig receiving depot would be "established there and would provide for the acceptance of live pigs "from producers in County Fermanagh and part of County Tyrone. "Then came a statement to the effect that live pigs would be conveyed "from the farm to the abattoir by the Northern Ireland Road Trans-"port Board at an 'all-in' charge of 8d. per pig but that producers who "wished to deliver their own pigs to the abattoir would not have to "pay this charge. The advertisement next gave the basis on which live "pigs would be paid for by the Ministry, and after that it informed "producers that what they had to do, if they wanted the transport "service offered for pigs ready for slaughter, was to give notice by "postcard or telephone not later than the Friday morning prior to the "week of the required uplift to the society's office or the Transport "Board's office or to one of the three named agents who included the "defendants Messrs. Noble & Thompson [who are no longer parties "to the proceedings.] The advertisement then ended by announcing "that the society 'are still prepared to accept farm killed pigs delivered "at producer's expense to their premises. These will be paid for at "current official prices for dead pigs.' "

The learned Chief Justice then pointed out that one of the attractions of the new project as thus advertised was undoubtedly the cheap transport facilities it made available. It was in fact clear that such transport was heavily subsidised. He summed up the situation in words upon which I cannot hope to improve: "The result of this has "been twofold: no sale of live pigs for slaughter has been possible in "the market for there have been no competent buyers and the sale of "dead pigs has stopped for the same reason. Since July 19, 1948, the

"society and the Ministry have ceased to pay the market owners any "sum for or in lieu of tolls and the plaintiffs' claim for tolls in respect "of pigs passing through the society's premises has been met by the "plea that no such tolls are payable. There cannot be any doubt that "the effect of the new project as it has been operated has been to make "most producers in the area sell their bacon pigs alive instead of dead "and to withdraw the bacon pig trade from the plaintiffs' market." It was in fact clear that the respondents' market rights in carcases had, as Curran J. had observed, been rendered valueless as the direct result of the scheme.

In these circumstances the question arises whether the transaction, in which the Ministry and society were thus involved, though it might otherwise be regarded as a legitimate trading transaction, and, beyond that, beneficial to the community by means of a reduction in the handling of pigs and a consequent improvement in their quality and the making of economies in their collection, was yet actionable as a disturbance of the respondents' market rights. The course which the action has taken precludes me from dealing forthwith with the case as on a single issue. For, though Curran J. dismissed the whole action, a distinction was made in the Court of Appeal, which admitted the claim to the extent that I will now indicate. It will be remembered that the advertisement to which I have referred offered to producers the choice of sending live pigs to the society's premises by means of transport provided by the Ministry or by means of transport provided by themselves. The Court of Appeal decided that, when producers adopted the first alternative, no actionable wrong was committed by the society or the Ministry, but that, when the second alternative was adopted and the Ministry sold to the society the pigs thus delivered at the society's premises, there was a disturbance of the respondents' market for which the society and the Ministry were liable in damages. Similarly, the Court of Appeal held that the purchase by the society of dead pigs delivered by producers at their premises was a disturbance by the society of the market and an actionable wrong. Hence your Lordships are faced with an appeal by the society and the Ministry against one part, and a cross-appeal by the respondents against another part, of the judgment.

My Lords, before I consider whether there is any justification for the differentiation made by the Court of Appeal, I must examine somewhat more closely the nature of the respondents' claim that their market rights have been disturbed. In what way, it must be asked, have they been disturbed? "Disturbance of a market" says the classic

textbook (Pease & Chitty, on Law of Markets and Fairs, 2nd ed., p. 62) "may be either by unlawfully setting up a rival market, or by "doing some other act or acts whereby the market-owner is deprived, "either wholly or in part, of the benefit of his franchise." The respondents accordingly followed the traditional path by alleging a disturbance by the appellants of their market by the levying of a rival market or otherwise. It was the levying of a rival market that they put in the front of their case and that was the only disturbance which was the alleged subject of conspiracy. It was also the ground upon which they obtained a partial judgment in their favour from the Court of Appeal. It was, however, open to them to establish disturbance otherwise and it was to this aspect of the case that their argument before your Lordships was largely directed.

I will deal first with the allegation that the appellants levied a rival market. In my opinion the respondents fall far short of establishing anything of the kind. Once more I will cite Pease & Chitty (p. 65): "What is a rival market is a question of fact. To sustain an action for "disturbance by setting up a rival market, it is not necessary to show "that the defendant has set up what purports to be a legal market, or "has usurped a franchise on the Crown by taking toll or holding a "court of pie powder. It is enough that he has erected stalls on his own "soil and taken rents in the nature of stallage for their use by persons "bringing their goods thither for sales, or has so used his land as to "encourage and provide for a concourse thereon of buyers and sellers; "for instance, by establishing a depot with conveniences for the "benefit of buyers and sellers, or by holding public auctions or sales "whereby persons are provided with a means of selling their goods "without bringing them to market. Where, however, he does not "publicly invite sellers indiscriminately but sells the goods of others "under contract or by private arrangement he is not levying a rival "market but is selling outside the market." It appears to me, my Lords, that this is an accurate and sufficiently exhaustive statement of the law and that it is supported by the cases that were cited at the Bar, of which I mention only *Great Eastern Railway Co. v. Goldsmid*[1], *London Corporation v. Lyons, Son & Co. (Fruit Brokers) Ltd.*[2], *Mayor of Dorchester v. Ensor*[3], *Elwes v. Payne*[4], and *Wilcox v. Steel*[5]. In the passage that I have cited, as over and over again in the cases that

[1] (1884) 9 App. Cas. 927; sub nom. *Goldsmid v. Great Eastern Railway Co.* (1883) 25 Ch.D. 511.
[2] [1936] Ch. 78; 51 T.L.R. 563.
[3] (1869) L.R. 4 Exch. 335.
[4] (1879) 12 Ch.D. 468.
[5] [1904] 1 Ch. 212.

support it, the essential feature of a rival market is said to be the provision of facilities for a concourse of buyers and sellers. This follows logically from the nature of a franchise of market of which no better definition has been given than by Chatterton V.-C. in *Downshire v. O'Brien*[1]: "A market is properly speaking the franchise right "of having a concourse of buyers and sellers to dispose of com- "modities in respect of which the franchise was given."

Let me then examine the class of case which is the subject of the cross-appeal, viz., where the producer has availed himself of the transport facilities provided by or on behalf of the Ministry. The learned Lord Chief Justice has held (and Black L.J. agreed with him) that in such a case, the sale to the Ministry having taken place at the farm at which the live pigs were delivered, there was so far no disturbance of the respondents' market rights. The market owners never had the right to prevent a farmer from selling privately on his farm, whether the sale was of one or two or a large number of pigs. Equally the same learned judges were of opinion that neither by bringing all the pigs so bought to the society's premises as a collecting centre nor by then selling them, whether before or after slaughter, to the society did the Ministry or the society in any way establish a rival market to the disturbance of the respondents' rights. It appears to me that this conclusion is unimpeachable, and the only criticism that I venture to make, which becomes of importance in considering the next class of case, is that the learned Chief Justice appears to me to attach too much significance to the fact that the sale takes place at the place at which the pigs are delivered to the transport authority or other agent of the Ministry. This, therefore, brings me to the second class of case, where the producer brings the live pigs to the society's premises by his own transport.

My Lords, the learned Lord Chief Justice proceeded to the consideration of this class of case upon the basis that the contract for sale of the pigs took place on the society's premises. He found that this created a radically different situation and held that it would be quite wrong and unrealistic to regard transactions induced by the invitation contained in the advertisement as private sales on private premises. He thought that the result was to make the society's premises a concourse of sellers though not of buyers but was of opinion that the one-sided nature of the concourse facilities did not prevent what had been done in this connection constituting a rival market. Here, my Lords, I must reluctantly differ from the Lord Chief Justice. I am by

[1] (1887) 19 L.R.Ir. 380, 390.

no means satisfied, from an examination of the relevant documents, that in this second class of case as in the first, the sale does not take place at an earlier date, viz., when the Ministry acknowledges the producer's so-called "entry of pigs" and directs him to arrange to deliver them to a named place or person on a named day. This view, I believe, commends itself to some of your Lordships. If so, there is an end of the differentiation between the two classes of case. But, whether this is so or not, I cannot accede to the view that a rival market is levied even if the sale to the Ministry takes place on the society's premises and the Ministry (as the fact is) then sells to the society the pigs it requires and dispatches any surplus to Belfast. It is true upon this assumption that a number of sellers take their produce to the same premises, though it would be a misuse of language to speak of a "concourse" of sellers. But apart from this there does not appear to be any single feature of a market. So far from there being a concourse of sellers and buyers, the public had no right to enter upon the society's premises in order to buy: and not only had they no right to enter but entry would have availed them nothing, for the Ministry, as they were well entitled to do, made their own arrangements for the disposal of the pigs. No doubt there have been cases where a rival market has been held to be established when all the sales have been made by a single auctioneer acting on behalf of a number of sellers, but such cases are remote from the present case and must, in any event, in view of the observations of Maugham L.J. in *London Corporation v. Lyons, Son & Co. (Fruit Brokers) Ltd.*[1] be very closely scrutinised.

What I have said about the second class of live pigs applies also to the sale of carcases to the society. In this the Ministry have no part. The society advertises its willingness to buy carcases: the producers bring them to its premises. The society takes them, pays for them, and uses them for its own purposes. I will presently examine whether this can in any other way be regarded as a disturbance of the respondents' market, but to the proposition that it is a disturbance by levying a rival market I can by no means assent. I sum up this part of the case, therefore, by saying that the respondents fail in respect of both classes of live pigs and of carcases to make good their claim of disturbance by a rival market.

But, my Lords, this does not conclude the case; for, as I pointed out some time ago, disturbance may take some other form than

[1] [1936] Ch. 78.

levying a rival market. This aspect of the case has caused me the difficulty that is commonly created when it is sought to pour new wine into old bottles. For let it be said at once that there is no case in the books which in its facts remotely resembles the present one. Counsel for the respondents, taking as their text the latter part of the first citation that I made from Pease & Chitty, contended that since there may be disturbance of a market by doing an act whereby the market owner is deprived either wholly or in part of the benefit of his franchise, it was sufficient to look at the sequence of events and thus conclude that, but for the scheme operated by the Ministry and the society, pigs live or dead which went direct to the society's premises would or might have found their way to the respondents' market. This means nothing less than that any act which may result in a loss to the market owner is an injury to him: it leaves no room for the damnum absque injuria which is a commonplace in a trading community: and it is in fact a proposition of law for which there is no foundation. If it was well founded, no shopkeeper or indeed any private person could buy or sell any marketable article within market limits: a view at one time held, at least in regard to sales on market days, but long since discarded: see *Mayor of Macclesfield v. Chapman*[1], and see, too, *London Corporation v. Lyons, Son & Co. (Fruit Brokers) Ltd.*[2], and particularly the observations of Maugham L.J. My Lords, I do not doubt that the general proposition for which the respondents contend must be qualified by saying that a sale outside the market which has or may have the effect of depriving the market owner of toll or some other advantage is an actionable disturbance only if the person selling takes or seeks to take benefit of the market. That is clearly a "fraud upon the market." The market owner provides the facilities and attracts the concourse. Whoever takes advantage of that concourse cannot fairly avoid paying his proper dues. I know of no case in which (apart from rival market cases) this has not been an essential element either express or implied. It may take many forms: e.g., where a cattle dealer leaves his sheep outside the market but goes to the market to find customers whom he takes outside and there sells his sheep to them (see *Bridgland v. Shapter*[3]), or by selling by sample in the market in order to evade paying toll on the bulk (see *Bailiffs of Tewkesbury v. Bricknell*[4]), or by intercepting goods on the way to market (see *Turner v. Sterling*[5], and, to cite a modern case, *Loughrey v. Doherty*[6]). Always the underlying as-

1 (1843) 12 M. & W. 18.
2 [1936] Ch. 78.
3 (1839) 5 M. & W. 375.
4 (1809) 2 Taunt. 120.
5 (1672) 2 Vent. 25.
6 [1928] I.R. 103, 117.

sumption is that, but for the act complained of, the producer would have paid toll or other dues in the market and that the intention of the act was to evade such payment.

It is impossible, in my opinion, to bring this law of the market into relation with the circumstances of the present case. It may well be that, if there had been no Pig Marketing Board, no war, no Defence Regulations, no Statutory Rules and Orders made under them, no Ministry of Agriculture, no new abattoir and other plant, the respondents' market in pigs alive and dead would have continued to flourish. It is possible to feel some regret that the market owners have suffered without compensation the loss of their market. But it is not the necessary consequence that the society or Ministry have been guilty of an actionable disturbance. They would admit, for it is clear from the correspondence, that they did not fail to foresee that one of the results of the new regime would be that toll would not be payable upon the pigs delivered to the society's premises, but it would be extravagant to suggest that the object of the scheme was to evade toll or that at any stage of it the producers, the Ministry, or the society got the benefit of the market without paying the proper dues. It was to the Ministry alone that the producer could sell live pigs for slaughter. Why should he send them to a market where there was no concourse of buyers and, if there had been, not one of them could buy? And how did the Ministry disturb the market when they sold the pigs to the licensed curer of their choice? No satisfactory answer was or could be given to these questions. Nor was a better answer given in respect of the carcases that were sold direct to the society by the producers. The claim that such sales were a disturbance of the market is, as I have already pointed out, tantamount to saying that no trader within the market limits can at any time buy a marketable article except in the market—a proposition that cannot be supported.

I need say nothing about the conspiracy claim. It follows from what I have said that it must fail.

In my opinion, therefore, the appeal must be allowed with costs and the cross-appeal dismissed with costs. The respondents (the cross-appellants) must pay the costs of the appellants in the Court of Appeal and in this House, and the order of Curran J., including his order as to costs, so far as it affects the parties to this appeal, should be restored.

LORD REID. My Lords, I entirely agree with what has been said by my noble and learned friend Lord Simonds, and I only add a few observations because we are differing from the Court of Appeal in Northern Ireland. I need say nothing about the position before 1948: the changes then made by the appellants, the society and the Ministry, were the cause of the present action being raised against them. The trade in pig carcases in the respondents' market ceased as a result of those changes and the question is whether the actions of the appellants in that year were or were not legitimate.

The first contention of the respondents is that the respondents' actions amounted to levying a rival market at the society's premises. So it seems to me that the first thing to do is to see what happened at those premises. The Ministry, who were the sole buyers of live pigs for slaughter, set up a collecting centre there by agreement with the society, and large numbers of pigs were brought there. Some were brought by carriers engaged by the Ministry to collect them from farms, and some were brought or sent by the farmers. But no bargaining took place there. The price at which and the terms on which the Ministry bought had been published and were not subject to variation, and the position was similar with regard to pig carcases sold to the society and delivered there. The public were not invited to come there: the only members of the public invited to come were persons who had live pigs or carcases for sale and who chose to bring them there or persons who the sellers engaged to take their pigs or carcases there. Those pigs or carcases were generally if not always brought at pre-arranged times and there was no concourse of people there: if two or more persons bringing pigs happened to arrive at the same time I do not think that that could be described as a concourse of sellers. I am assuming that the property in the pigs and carcases had not passed until they were delivered, although I think that it had. Even if there could be a rival market without a concourse of buyers and sellers there must at least be activities in the "rival market" which bears some resemblance to the activities in an ordinary market and here I can see none. At best for the respondents all that happened was that a number of sellers arrived in succession and delivered their pigs or carcases, the property in which then passed to the Ministry or the society.

Then the respondents contended on more general grounds that the appellants' activities amounted to disturbance of their market. In a sense they did because it may well be that if the changes made in 1948 had never been made the trade in their market would have continued.

But that is not what is meant by disturbance of a market as an actionable wrong. In general a person commits no tort if he buys goods which the seller might otherwise have sent to market. What he is not entitled to do is to take advantage of the concourse of the market. Typical examples are intercepting a seller on the way to the market and buying the goods before they reach the market, or going into the market to find a buyer who will come out and buy goods outside the market. It might be difficult in some cases to decide whether a person had taken advantage of the concourse but in this case it appears to me to be impossible to say that the appellants took any such advantage. Their operations could have been conducted in exactly the same way if there had never been a market.

LORD TUCKER. My Lords, I agree that the appeal be allowed and the cross-appeal dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM. My Lords, I agree. I think the learned Lord Chief Justice would have reached the same result if he had not thought that the society's premises were a place of public resort in respect of what he regarded as the sale there of live pigs and pig carcases by the producers.

The transactions completed there he distinguished from the sales of pigs on the producers' farms which he held were private sales on private premises whereas the transactions on the society's premises he held were not. He seems to regard the producers as public resorting to the society's premises and constituting a concourse of sellers, which in his view distinguishes the two cases. The matter cannot, I think, be so regarded. The society's premises are, in my view, as much private premises as is the shop of a shopkeeper and though, as *Goldsmid's* case[1] shows, a rival market may be set up in private premises, the coming of sellers to the society's premises with a commodity in which the Ministry or the society trades does not seem to me to be distinguishable from a stream of purchasers coming to a shop to buy the commodities in which the shopkeeper deals. In neither case is there a concourse of buyers and sellers. There is merely a succession of persons who come with a predetermined object to buy from, or sell to, a particular individual and depart when that object has been accomplished. I doubt if it is right to regard the buyers in the one case as a concourse of buyers and the sellers in the other as a con-

[1] 9 App. Cas. 927; 25 Ch.D. 511.

course of sellers. So far as I have observed from the cases the phrase "a concourse of buyers and sellers" seems to be used as a coming together of buyers and sellers, a concourse of both, not separate concourses of each. "Concourse," in any event, does not seem to me to be an apt word to apply to persons who are not gathered together in one place for a common purpose, but who come independently and at their own convenience to particular premises with the object of buying from, or selling to, the occupier of these premises. In my opinion the arrangements and transactions of the Ministry and the society present none of the essential features of a market. *Goldsmid's* case[1] was a clear case of a concourse of buyers and sellers but there is some indication, particularly in the judgment of Cotton L.J., that if the acts complained of had been solely the acts of the tenants of the railways company the decision might have been different. If the argument for rival market fails, a claim for any other kind of disturbance must, in this case, in my opinion, also fail.

Lord Somervell of Harrow. My Lords, Lord MacDermott held that in cases where the contract of sale was made on the farms no advantage was taken of the market and no tort was committed. This was the position, in his view, when pigs were collected by the advertised transport facilities.

Where pigs were delivered by the producers at the society's premises he held (1) that the contract was not completed until delivery at the society's premises, and (2) that the sales were therefore tortious in that the invitation to sellers to sell at the society's premises constituted a rival market.

I think that in those cases the contract may have been concluded at an earlier stage but in any case I am unable to regard the invitation to producers to bring their pigs to be purchased by the Minister at the society's premises as constituting those premises a rival market.

A market is a place to which sellers who have not found buyers take their goods in the hope of finding buyers and to which buyers resort in the hope of finding the goods they want. If a seller has found a buyer or buyers, or a buyer has found the goods he wants in the hands of one or more sellers there is no need for either side to resort to the market. The word "concourse" is ambiguous. The suggestion that an invitation to sellers in a market area might be a tort would be very far-reaching. It is common for a trader to advertise the fact that he is a willing purchaser of old iron, fruit, or vegetables, etc. If as a

[1] 9 App. Cas. 927: 25 Ch.D. 511.

result goods are sold to him direct which previously went through the market, no tort is, in my opinion, committed against the holder of the market.

This, I think, disposes of the claim so far as it relates to purchases by the Minister. The Minister having bought the pigs had only one buyer to whom he wished to sell, the society. I agree with Lord MacDermott that these sales were not torts as against the plaintiffs. The seller had found his buyer and had no need to take his goods to market.

There is a proviso to the above general principles in that a man may commit the tort of disturbing market rights if he takes advantage of the market in order to find a buyer, or goods which he wants to buy. A simple case is that of a buyer who waits for and buys an animal on its way to the market. In the present transactions it seems to me that no advantage was taken of the market. Everything would have happened as it did if there had been no market in Enniskillen and previous sales had been done direct between producers and curers.

For these reasons I would allow the appeal and dismiss the cross-appeal, and I agree with the order suggested by my noble and learned friend on the Woolsack.

Appeal allowed.

Cross-appeal dismissed.

Solicitors: *Linklaters & Paines*; *Stephenson, Harwood & Tatham.*

J.A.G.

O. D. CARS LTD. v. BELFAST CORPORATION[1]

Northern Ireland—Constitutional law—Validity of statute—Act of Northern Ireland Parliament purporting to give power to impose restrictions on building development—Negative prohibition "take any property without "compensation"—Reasonableness as test of validity—Act which commits test of reasonableness to executive ultra vires—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5. *c.* 67), *s.* 5 (1)—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5. *c.* 12), *s.* 10 (2).

Planning Acts—Interim development—Refusal of permission to build—Whether compensation payable—Planning (Interim Development) Act (Northern Ireland), 1944 (7 & 8 *Geo.* 6. *c.* 3), *s.* 6 (4).

Section 5 (1) of the Government of Ireland Act, 1920, prohibits the Parliament of Northern Ireland making a law so as either directly or indirectly to take any property without compensation. The word "take" in this provision imports not only a taking over but also a taking away, such as may be effected without any transfer or change of ownership or possession, and accordingly the imposition of a restriction or prohibition or other interference with proprietary rights may constitute a taking of property within the subsection. However, a restriction which is merely regulatory in character does not contravene the provisions of section 5 (1) if (a) the legislation is directed in substance to furthering the public interest, and (b) the restriction is reasonable and proper for the purpose. But the question whether legislation of the Parliament of Northern Ireland offends the provisions of the Government of Ireland Act, 1920, is one for the courts to decide, and such legislation as purports to commit a test of validity to the executive is therefore ultra vires.

Section 9 (1) of the Planning and Housing Act (Northern Ireland), 1931, provides that compensation shall be payable to anyone whose property is injuriously affected by the coming into operation of a planning scheme. Section 10 (2) of the same Act provides that "property shall not be deemed to "be injuriously affected by reason of the coming into operation of any pro- "visions inserted in a planning scheme, which prescribe the space about "buildings or limit the number of buildings to be erected, or prescribe the "height or character or user of buildings, or prescribe a standard of net "annual value for buildings, and which the Ministry, having regard to the "nature and situation of the land affected by the provisions, considers "reasonable for the purpose."

The Planning (Interim Development) Act (Northern Ireland), 1944, provides that all land not the subject of a planning scheme, or of a resolution to prepare and adopt such a scheme, shall be deemed to be subject to a resolution to prepare a planning scheme; and by section 2 of that Act the Ministry was directed to make a general interim development order to apply with respect to such land. Under this power the Ministry made the Planning (General Interim Development) Order, 1944, which, inter alia, empowered

[1] In the Court of Appeal before Lord MacDermott L.C.J. and Black L.J.: May 5, 6, 7, 8; June 3, 4, 5, 6, 9, 10, 1958; March 26, 1959.

the planning authority to grant permission for interim development within their area. Section 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944, provides that where an application for interim development is refused the applicant shall be entitled to obtain such compensation in respect of any injurious affection to his property by reason of the refusal as he would have been entitled to under the Planning and Housing Act (Northern Ireland), 1931, if such injurious affection had been suffered as the consequence of the coming into operation of a planning scheme.

The appellants, who for many years had carried on the business of garage proprietors and motor engineers, applied for permission to erect further industrial and commercial buildings on their land, but permission was refused on the ground that the proposed development was in part contrary to the planning authority's requirements for the site relating to the height and character of buildings, and in part contrary to their requirements relating to the character and user of buildings.

Held, (i) that section 6 (4) of the Act of 1944 had the effect of incorporating a reference to section 10 (2) of the Act of 1931 as well as to the compensatory provisions contained in section 9 of that Act; (ii) that the purported effect of section 10 (2) of the Act of 1931 was to defeat the appellant's claim to compensation, but as that subsection empowered the Ministry to determine whether the provisions to which it applies were reasonable, it was invalid on the ground that the issue of reasonableness, as one of the tests of the constitutional validity of the legislation in question, was a matter for the established courts, and not for the executive, to decide; and that section 10 (2) could not be severed so as to save its other provisions.

APPEAL to the Court of Appeal pursuant to section 50 of the Government of Ireland Act, 1920, from a decision of a Divisional Court of the Queen's Bench Division (Curran L.J. and Sheil J.) on the hearing of a case stated by an official arbitrator under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

The facts of the case appear sufficiently in the judgment of the Lord Chief Justice.

Patton Q.C. and *McConnell* for the appellants. The right of appeal in this case arises under section 50 of the Government of Ireland Act, 1920, but the jurisdiction of the court is not restricted to the question of the validity of the impugned enactment. Once the right of appeal is established the appeal is against the whole of the order made in the court below. If that court was wrong in holding that section 6 (4) of the Planning (Interim Development) Act, 1944, incorporates section 10 (2) of the Planning and Housing Act, 1931, then the point under section 5 of the Government of Ireland Act, 1920, would not arise.

Firstly, it is submitted that section 6 (4) of the 1944 Act is complete in itself and that it can operate without incorporating the provisions

of section 10 (2) of the 1931 Act. That Act dealt with planning schemes, not with interim development, and section 10 (2) presupposes the existence of a planning scheme. If there is no planning scheme in existence there is no criterion by which the Ministry can be satisfied that a particular restriction is reasonable for the purpose of the scheme. Under the 1931 Act compensation was to be awarded for certain types of injurious affection. The situation is quite different under section 6 (4) of the 1944 Act which gives entitlement to compensation for "any injurious affection."

Secondly, if section 10 (2) does not apply, what is the meaning of the phrase "shall not be deemed to be injuriously affected"? It is submitted that what it means is that property shall not be automatically deemed to be injuriously affected without evidence of damage. The types of restriction contemplated by the section might in fact enhance the value of property depending upon the circumstances. If the wording had been "shall be deemed not to be injuriously affected" it would be quite a different matter but as the section stands the Legislature cannot have contemplated refusal of compensation where damage is in fact proved.

If, however, it is held that section 10 (2) applies and that its effect is to exclude compensation, then one comes to the question of its validity under section 5 of the Government of Ireland Act, 1920.

It is submitted that a planning refusal of this nature can constitute a "taking of property". "Property" can be something other than a physical entity. Goodwill, or the right to have renewal of a lease, have been held to be property. In this case the appellants have been subject to a "taking away" of their right to erect a building on their own ground. Admittedly the right which they have lost has not vested in anyone else and to that extent the position differs from that in *Ulster Transport Authority v. James Brown & Sons, Ltd.*[1] where the majority of the court appeared to have taken the view that there was a vesting of the goodwill in the Transport Authority. It is submitted, however, that it is not necessary to have a vesting in someone else in order to have a taking. On the authorities property is not confined to a physical entity.

In *Londonderry County Council v. M'Glade*[2] it was held that a transfer of elementary schools to the county council was not a taking from the children because they had never had any property in the

[1] [1953] N.I. 79.

[2] [1929] N.I. 47.

schools and as Wilson J. said[1]: "No property in these schools or "legal rights to attend these schools is taken away from these "children." In *Robb v. Electricity Board for Northern Ireland*[2] the case proceeded entirely on the assumption that the taking of one of the rights of property would be a taking of property. *O'Neill v. Northern Ireland Road Transport Board*[3] suggests nothing to the contrary and establishes that the word "property" in section 5 is not limited to property of a religious body or denomination. In *Northern Ireland Road Transport Board v. Benson*[4] the majority of the Court of Appeal took the view that a "mere negative prohibition" was not a taking but that decision has not since found favour and it is submitted that as the decision was made without jurisdiction it is not binding.

In this case the right of the appellants to erect a building on their land has been taken away. That right is property. In the Conveyancing and Law of Property Act, 1881, the word "property" is defined as including "real and personal property, and any estate or interest in "any property real or personal, and any debt, and any thing in "action, and any other right or interest". In *Gough's Garages, Ltd. v. Pugsley*[5] Greer L.J. said: "I should not be disposed to put too narrow "an interpretation on the word 'property'." In that case it was held that the right to apply for renewal of a lease was property which might be pledged to debenture holders as part of their security. Property comprises a totality of rights converted into a single entity; any tangible or intangible thing which the court protects under the name of property: *McCaughey v. Commissioner of Stamp Duties*[6]; *Minister of State for the Army v. Dalziel*[7]; *Australian Mutual Provident Society v. Gregory*[8]. It is possible to take property without taking the sum total of the proprietary rights in the article or thing which is the subject matter of the property. Where sub-divisions of a totality of rights in a thing are made by statute and where one or more of these sub-divisions is taken, there is a taking of "property" notwithstanding that a fresh sub-division does not correspond with the known sub-divisions of the totality.

The three questions arising on this appeal are—(i) Does section 6 (4) of the 1944 Act bring in section 10 (2) of the 1931 Act? (ii) Has section 10 (2) the effect of excluding compensation? (iii) If so, is it invalid under section 5 of the 1920 Act? The appellants are entitled to the benefit of every doubt arising on those questions because they

1 [1929] N.I. at 56.
2 [1937] N.I. 103.
3 [1938] N.I. 104.
4 [1940] N.I. 133.
5 [1930] 1 K.B. 615, 621.
6 (1945) 46 S.R. N.S.W. 192.
7 (1944) 68 C.L.R. 261.
8 (1908) 5 C.L.R. 615.

have had loss inflicted upon them without the accrual of any corresponding benefit.

[The court exercised its power to invite the Attorney-General to intervene.]

Maginess, Q.C., A.-G., Nicholson Q.C. and *Pringle.* The circumstances in the present case do not amount to a taking within the meaning of section 5 (1) of the 1920 Act. In earlier Northern Ireland decisions the judges have made it clear that the section did not apply to matters of prohibition. *France Fenwick & Co., Ltd. v. The King*[1] is a relevant authority because the only difference between the position in England and that obtaining here is that a Westminster statute can exclude compensation for the taking of property whereas a Northern Ireland statute cannot. The basic common law principle, that an intention to take property without compensation is not to be imputed to the Legislature unless it is expressed in unequivocal terms, which was discussed in the *France Fenwick* case[1], may have no bearing here: but that fact does not negative the authority of the decision on what constitutes a taking of property. If a mere negative prohibition does not constitute a taking of property in England it cannot do so here. The Australian cases cited are distinguishable on the ground that there was a transfer of possession to the government. Before property can be said to be taken within the meaning of section 5, there must be a transfer, either direct as in the Australian cases, or indirect as in *Brown's* case[2]. In the present case there is no divesting: no one else is empowered to do the acts which the appellants are prohibited from doing. Section 5 envisages property passing from one person and coming, whether directly or indirectly, into the possession of someone else. As Andrews L.C.J. said in *Benson's* case[3]: "There is in my judg-"ment a fundamental and well recognised distinction between taking "or authorising property to be taken without paying compensation, "this involving an actual use or taking of property into possession, "and a negative or restrictive provision which merely involves inter-"ference with the owner's enjoyment of property."

In the present case the right to build has been frozen or destroyed but it has not been vested in anyone else. It would be a misuse of language to say that there had been a taking, and the courts should not be acute to construe legislation as being ultra vires. The American courts have had difficulty with similar types of legislation and they seem to have favoured the view that prohibition of a noxious use of

[1] [1927] 1 K.B. 458.
[2] [1953] N.I. 79.
[3] [1940] N.I. 133.

property or of one which is prejudicial to the community is not compensatable: *Mugler v. Kansas*[1]; Theyer. Cases on Constitutional Law, p. 693.

Should the court, however, take the view that there had been a taking within the meaning of section 5, then it must look at the intention of the legislation to ascertain its pith and substance. It cannot be said that the purpose of section 10 (2) of the 1931 Act was to take property either directly or indirectly. The purpose was the regulation of building development in the general interest. The fact that some interference with rights of property was a necessary incident to the accomplishment of the main purpose does not make the legislation ultra vires.

To hold that in the circumstances of this case there has been a taking of property would be to create a disparity between the law obtaining in England and that in Ireland. Legislation must be construed in accordance with ordinary common law principles and the interpretation must be sufficiently large and liberal to permit of the Northern Ireland Parliament being "mistress in her own house": *Edwards v. Attorney-General for Canada*[2].

"Take" in section 5 means "acquire" in contradistinction to "injuriously affect" in compensation statutes: *Tiverton and North Devon Railway Co. v. Loosemore*[3]. The word "take" must be construed in its primary sense. The dictionary definitions of the primary meaning of the word "take" do not include "deprive". Section 5 was never intended to apply to passive restrictions on the use of property. The decision in the *France Fenwick* case[4] that a mere prohibition is not a taking is applicable to the present case and governs the position. The authorities cited by Lord Atkinson in *Central Control Board v. Cannon Brewery Co., Ltd.*[5] show that when he says[6] "the taking "away of, or causing damage to, the subject's property" he was not contemplating the case of mere restriction of user. Lord Parmoor in the same case refers[7] to property "compulsorily *acquired* for public "purposes" and Lord Atkinson, dealing with the same principle of construction in the later case of *Attorney-General v. De Keyser's Royal Hotel*[8] confines himself to the words "take away the property of "the subject." The principle to be derived from the authorities is that "take" can mean something more than "acquire" but falls short of negative prohibition. In cases which do not involve acquisition there

1 (1887) 123 U.S. 632.
2 [1930] A.C. 124.
3 (1884) 9 App. Cas. 480, 490.
4 [1927] 1 K.B. 458.
5 [1919] A.C. 744.
6 Ibid. 752.
7 Ibid. 760.
8 [1920] A.C. 508, 542.

must be a positive action of interference as there was in *West Midlands Joint Electricity Authority v. Pitt*[1] and *Consett Iron Co. v. Clavering Trustees*[2]. In the first of those cases there was physical interference with property by the placing of electric lines across lands, and in the second there was a positive act of interference with contract. The only case in which the principle seems to have been treated as being applicable to a negative prohibition is *In re Ellis & Ruislip-Northwood U.D.C.*[3]. It is submitted that the reasoning of Eve J., is unsound.

In compensation law it has long been recognised that there must be some limit to the area of injurious affection: *Ricket v. Metropolitan Railway Co.*[4]. It may be trite to observe at this stage that there must be a limit to the meaning of the word "take" in section 5. It obviously cannot mean just "affect" or "depreciate" even assuming that it does travel beyond acquisition or physical interference. This is where the pith and substance doctrine comes in—a doctrine which originated from the difficulty of reconciling sections 91 and 92 of the British North America Act, 1867: *Citizens Insurance Company of Canada v. Parsons*[5]: *Russell v. The Queen*[6]. "It must be shown affirmatively by "the party challenging a statute which is upon its face intra vires that "it was enacted as part of a plan to effect indirectly something which "the legislature had no power to achieve directly." per Lord Oaksey in *Pillai v. Mudanayake*[7], an appeal from the Supreme Court of Ceylon. "If, on the view of the statute as a whole, you find that the "substance of the legislation is within the express powers, then it is "not invalidated if incidentally it affects matters which are outside the "authorised field." per Lord Atkin in *Gallagher v. Lynn*[8]. Something in the nature of a pith and substance approach was used in *Hughes and Vale Proprietary Ltd. v. State of New South Wales*[9] and *Commonwealth of Australia v. Bank of New South Wales*[10]. It is difficult to formulate a rule but it would seem that there is no taking of property if the legislation impugned is, in its true nature and character, in its pith and substance, regulatory and not confiscatory. That seems to be the essence of the decisions but it would not cover the case of a statute which, though truly regulatory, operated so as to acquire, in the full sense, a piece of property. One test is to look at the effect of the legislation on the property. Other considerations are—Has the owner of the property brought the injury upon himself?—Does the

1 [1932] 2 K.B. 1.
2 [1935] 2 K.B. 42, 65.
3 [1920] 1 K.B. 343.
4 (1867) 2 H.L. 175, 198.
5 (1881) 7 App. Cas. 96.
6 (1882) 7 App. Cas. 829.
7 [1953] A.C. 514, 528.
8 [1937] A.C. 863, 870.
9 [1955] A.C. 241.
10 [1950] A.C. 235.

legislation bear unequally upon the subject?—Is the legislation discriminatory?—Is it arbitrary or capricious? The pith and substance doctrine only arises if a deprivation of enjoyment is held to be a taking, but if it is applicable then it becomes a question of degree. *Slattery v. Naylor*[1] shows the approach in the type of case where a question of degree has to be decided. The test is not quite one of unreasonableness but something very like it. A similar approach has been used in the United States under the "due process" clause in the Fourteenth Amendment. The decision in *United States v. Causby*[2] indicates that a taking, short of acquisition, must involve a physical invasion. "Taking" if it can include the taking away of a proprietary right, must be confined to acts affecting the land in some physical way. See also *Northern Transportation Company of Ohio v. Chicago*[3]; *Pennsylvania Coal Company v. Mahon*[4]; *Village of Euclid v. Ambler Realty Company*[5].

"Indirectly" in section 5 contemplates a legislative device and not an incidental effect. Legislation may be regulatory even though it incidentally affects property. It may also, though regulatory, go too far. If a prohibition is a taking there is no escape from the necessity to introduce the test of reasonableness, thereby involving a radical departure from what has hitherto been the practice of the courts in dealing with this type of problem.

Gibson Q.C. and *Moody* for the respondent. On the construction of the relevant legislation, the appellant's contention that section 10 (2) of the 1931 Act is not incorporated by section 6 (4) of the 1944 Act would involve the illogical situation that there would be compensation for an interim refusal of planning permission in cases where it would not be given for a final refusal, and would mean giving two different meanings to the term "injurious affection".

If it was intended to give compensation in every case for a planning refusal then the wording of section 6 (4) is singularly inappropriate. If it had been intended to give compensation for diminution in value it could easily have been so stated. The expression "injurious affection" in the Planning Acts has the same meaning as in the Lands Clauses Acts. Alternatively, the expression has the same meaning in the Act of 1944 as in the Act of 1931: see section 9 (1) of the Act of 1944. Damage of the nature suffered by the claimant is expressly excluded from the category of injurious affection in the Act of 1931 and therefore is not injurious affection within the Act of 1944.

1 (1888) 13 App. Cas. 446.
2 (1946) 328 U.S. 256.
3 (1879) 99 U.S. 635.
4 (1922) 260 U.S. 393.
5 (1926) 272 U.S. 365.

It is submitted that the phrase "for the purpose" in section 10 (2) of the 1931 Act means "for the purpose of securing the amenity of the "area", or for the purpose of the provision: *In re Ellis & Ruislip-Northwood U.D.C.*[1].

Before the passing of the 1944 Act the position under the 1931 Act seems to have been that so far as interim development was concerned there was no provision for compensation for a restriction of development. The only rights to compensation were those which arose if a prohibition was actually contained in a planning scheme, or if permission were given for interim development and later revoked. How far, if at all, does the 1944 Act better the position of an owner met with an interim development refusal? Section 2 of that Act is really a re-enactment in an amplified form of section 4 of the 1931 Act. Section 6 only gives the same right to compensation as if there had been a final refusal as distinct from an interim refusal. It defines the person who suffers loss as a result of a planning refusal and yet is not entitled to compensation as being a person whose land has not been injuriously affected. A person claiming compensation must put himself in the shoes of a person affected by a planning scheme.

On the constitutional issue it is submitted that "property" in section 5 of the 1920 Act is confined to property of a religious organisation. That point has been decided otherwise in *O'Neill v. Northern Ireland Road Transport Board*[2] and it is made now solely for the purpose of keeping it open. Alternatively, "property" means land or other tangible property.

The word property has two chief meanings: (i) ownership; the relationship of a person to a thing involving the aggregation of the rights of ownership, and (ii) the object of ownership. It is submitted that the second meaning is that contemplated by section 5 of the 1920 Act. It speaks not of rights but of objects. The characteristics of property are that it is (a) capable of ownership, (b) capable of exclusive enjoyment and recovery of possession, (c) disposable—capable of separate existence and separate ownership. The right to build is admittedly one of the aspects of ownership, but it fulfils none of the criteria of property.

A prohibition against building is not a taking, either direct or indirect. "Take" means "take over." If Parliament is to legislate at all in respect of property it is bound to restrict the freedom which owners would otherwise have had. Legislation which compels people

[1] [1920] 1 K.B. 343. [2] [1938] N.I. 104.

to do what they ought to do voluntarily in the general interest is inevitable in any society and does not constitute a taking of property.

Patton Q.C. in reply. The short answer to the argument on the meaning of section 5 of the 1920 Act is that the section says "take" and not "take possession of"—a totally different conception. "Take" means "take away". It is obvious that acceptance of this meaning requires that a limitation be reached somewhere, but it is not necessary for the appellants to indicate where exactly the line is to be drawn. All that is necessary is to show that this case is clearly on one side, but it is suggested that cases which would be on the other side are cases where the giving of compensation would be inconsistent with the purpose of the particular enactment. Giving compensation does not defeat the object of planning though it may make it more difficult and expensive. Section 5 is a limitation or modification of the powers given by section 4. It may be that the modification applies to all three categories of peace, order and good government, but one way of looking at it would be to say that it applies to good government only. It might be that if you can show that a particular enactment comes properly within legislation for peace or order it is free of the restriction imposed by section 5.

The well-known principle of English law stated in *London & N.W. Railway Co. v. Evans*[1] and cited with approval in *Attorney-General v. De Keyser's Royal Hotel*[2] creates a rebuttable presumption against the taking of property without compensation. The least effect that can be given to section 5 is to convert that rebuttable presumption into a irrebuttable one. It has been contended that the principle does not apply in the case of a statutory negative prohibition. The answer to that contention lies firstly in *London & N.W. Railway Co. v. Evans*[1]. A right of support bears the greatest resemblance to the right in the present case. The content of a right of support is nothing more than prohibition. The fact that it is a right which has come to be recognised by passage of time does not distinguish it from other rights of the same nature. Secondly the answer lies in *In re Ellis & Ruislip-Northwood U.D.C.*[3]. Against those two cases is cited *France Fenwick & Co. Ltd. v. The King*[4], a case which does not affect this question at all. *Central Control Board v. Cannon Brewery*[5] has no relation whatsoever to a common law right to get compensation.

It has been contended that a fluid interpretation should be given to

[1] [1893] 1 Ch. 16, 28.
[2] [1920] A.C. 508, 542.
[3] [1920] 1 K.B. 343.
[4] [1927] 1 K.B. 458.
[5] [1919] A.C. 744.

a constitutional statute on the basis of *Hughes and Vale Proprietary Ltd. v. State of New South Wales*[1]. That proposition may be apt in the case of a constitutional statute which is incapable of amendment.

It is submitted that the series of American cases cited are not relevant in this court but in so far as they have been referred to *United States v. Causby*[2] would carry the appellant's contention quite a long way.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: The appellant company is the owner of a parcel of land situate at Alexandra Park Avenue in the City of Belfast, which it holds in fee. This land has a frontage to the Antrim Road, one of the City's main thoroughfares. For many years the appellant company has carried on the business of garage proprietors and motor engineers in buildings erected on part of the land in question. On February 9, 1954, the appellant applied to the respondents, as the interim development authority for the City of Belfast, for permission to erect further industrial and commercial buildings on approximately 2½ acres of this site. This proposed development involved two projects. The first of these was the provision of lock-up shops on the Antrim Road. The second contemplated an industrial user of the back portion of the site and the provision of a factory or warehouse thereon. By notice dated March 2, 1954, the respondents refused the permission which had thus been sought. This document stated the reasons for this refusal as follows:

"(a) lock-up shops, Antrim Road: the height and character of "proposed development would not be in accordance with the "Corporation's requirements for the site, namely, development to be "in shops with dwellings over - minimum height 25 feet.

"(b) industrial or commercial use of remainder of site, the site is "zoned as residential and the character and user of the proposed "development would be incompatible with such zoning."

It will be convenient to pause here in order to note as briefly as possible how this application came to be made and how the respondents were in a position to refuse it.

The Planning and Housing Act (Northern Ireland), 1931, was passed to provide, inter alia, for the making of schemes laying down plans for the development or re-development of land. Section 1 (1) of this Act provides that planning schemes may be made thereunder

[1] [1955] A.C. 241. [2] (1946) 328 U.S. 256.

"....as respects any land with the general object of securing proper "sanitary conditions, amenity and convenience in connection with "the laying out and use of the land, and of any neighbouring lands, "or in connection with the re-development of the land if already "developed."

Section 2 (1) empowers a local authority to decide by resolution to prepare a planning scheme with reference to any land within its district, and subsection (2) of the same section provides that a planning scheme prepared by a local authority shall require the approval of the Ministry of Home Affairs, now the Ministry of Health and Local Government. Section 5 deals with the contents of planning schemes which, by subsection (2) thereof, may include provisions (a) prescribing the space about buildings, (b) limiting the number of buildings, (c) prescribing the height, character or user of buildings, and (d) prescribing a standard of net annual value for buildings. Section 9 (1) deals with compensation and is very much in point. It runs thus: "9.—(1) Any person whose property is injuriously affected "by the coming into operation of a planning scheme shall, if he makes "a claim for the purpose within the time (if any) limited by the scheme, "not being less than three months after the date on which the pro- "vision giving rise to the claim came into operation, be entitled to "obtain compensation in respect thereof from the responsible "authority."

Section 10 (2) is also important. Omitting the proviso, which has no direct bearing on this appeal, it reads as follows: "10.—(2) Pro- "perty shall not be deemed to be injuriously affected by reason of the "coming into operation of any provisions inserted in a planning "scheme, which prescribe the space about buildings or limit the "number of buildings to be erected, or prescribe the height or "character or user of buildings, or prescribe a standard of net annual "value for buildings, and which the Ministry, having regard to the "nature and situation of the land affected by the provisions, considers "reasonable for the purpose."

Progress under the Act of 1931 was slow and was much hindered by the outbreak of war in 1939. By then some local authorities had resolved to prepare a planning scheme and some had not. We were told at the hearing that the respondents had so resolved in 1934. This was not proved, but as will appear in a moment the omission to do so is not material. By 1944 it was apparent that something would have to be done to regulate development pending the coming into operation of planning schemes. The result was the passing of the Planning

(Interim Development) Act (Northern Ireland), 1944. Section 1 (1) of that Act deems all land which was not the subject of a planning scheme under the Act of 1931, or of a resolution to prepare or adopt such a scheme, to be subject to a resolution to prepare a planning scheme under that Act; and section 2 directs the Ministry to make a general interim development order with respect to land to which such a resolution applies, and provides that such an order may empower any local authority specified therein to permit the development of land in accordance with the provisions of that section. In conformity with the duty thus placed upon it, the Ministry, on July 10, 1944, made the Planning (General Interim Development) Order (Northern Ireland), 1944 (S. R. & O. 1944, No. 58) which, inter alia, empowered the respondents to grant permission for the development of land within the County Borough of Belfast, subject to an exception which is not now material. I need not refer in detail to the other provisions of this Order or to the powers given to a local development authority under the legislation to which I have referred, as the validity of the respondents' refusal to accede to the appellant's application was not disputed before us.

Section 6 (4) of the Act of 1944 deals with the question of compensation for injurious affection occasioned by reason of such a refusal and is highly relevant. Omitting what is not material, it enacts as follows: "6.—(4) Where.... an interim development application "is refused.... then, the applicant.... shall, if he makes a claim for "the purpose be entitled to obtain from the local authority such "compensation in respect of any injurious affection of his property by "reason of the aforesaid decision as he would be entitled to obtain "under the principal Act [the Act of 1931] if such injurious affection "had been suffered as a consequence of the coming into operation of "a planning scheme....."

This subsection further provides that any question as to whether a person is entitled to such compensation or as to the amount thereof is to be determined in like manner as a claim for compensation under section 9 of the principal Act, that is to say, by arbitration.

The appellant having sought compensation for injurious affection under section 6 (4) of the 1944 Act, the respondents contended that the claim was defeated by section 10 (2) of the Act of 1931, since the restrictions applied by their refusal of the appellant's application fell within that subsection and the Ministry's attitude satisfied the condition described therein by the words "....and which the Ministry, "having regard to the nature and situation of the land affected by the

"provisions, considers reasonable for the purpose". To prove this last requirement the respondents relied upon the testimony of Mr. A. P. Fitzgerald, a principal officer of the Ministry, and upon a letter dated January 3, 1955, from Mr. Ronald Green, then an Assistant Secretary of the Ministry, to the respondents' solicitor. The arbitrator has found as a fact that the appellant has been damnified by the respondents' refusal of its application, and it may be said at once, as there was really no dispute about it, that this damnification, though not measured by the arbitrator, must be regarded as substantial and as flowing from what would certainly be entitled to rank as "injurious "affection" for the purposes of section 9 of the Act of 1931 if that section stood alone. The respondents having raised the points mentioned, the arbitrator, without proceeding to an award, stated a case, submitting the following two questions for the opinion of the court:

"1. Whether I am entitled to award compensation to the claimant "for injurious affection of the said land.

"2. Whether the evidence of Mr. A. P. Fitzgerald is sufficient to "satisfy the requirements of section 10 (2) of the Planning and Hous- "ing Act (Northern Ireland) 1931."

The case stated by the arbitrator came before a Divisional Court consisting of Curran L.J. and Sheil J. This court answered the second of these questions in the negative. In reply to the first it said: "The arbitrator is entitled to award compensation to the claimant for "injurious affection of the said land unless he is satisfied on further "and proper evidence that the Ministry considers the restrictions im- "posed reasonable for the purpose in pursuance of section 10 (2) of "the Planning and Housing Act (Northern Ireland) 1931, in which "event by reason of the provisions of section 10 (2) of the Planning "and Housing Act (Northern Ireland) 1931, and of the Planning "(Interim Development) Act (Northern Ireland) 1944, the lands "would not be deemed to be injuriously affected, and those pro- "visions would disentitle the claimant from any right to compen- "sation for injurious affection of the said land."

The principal questions raised before us may be enumerated as follows:

(1) On its true construction does section 6 (4) of the Act of 1944 incorporate a reference to section 10 (2) of the Act of 1931 as well as to the compensatory provisions of section 9 of that Act?

(2) If so, does section 10 (2)—assuming (a) the fulfilment of its

conditions, and (b) its validity as an enactment—defeat the appellant's claim for compensation?

(3) If the answer to (2) is "Yes", are the conditions of section 10 (2) fulfilled?

(4) If the answer to (2) is "Yes", is section 10 (2) a valid enactment having regard to the provisions of section 5 of the Government of Ireland Act, 1920?

It is this last question which has brought the present appeal before this court by virtue of section 50 of the Government of Ireland Act, 1920, as modified by paragraph 6 of the First Schedule to the Irish Free State (Consequential Provisions) Act, 1922; but whether or not it is a question which raises a live issue in this case depends on the way in which the other questions are answered, and I am therefore of opinion that it is our duty to consider those other questions first.

As to question (1): I entertain no doubt that the answer should be in the affirmative. Despite an ingenious argument to the effect that section 6 (4) incorporated only those provisions of the earlier Act which related to what was injurious affection, and thereby excluded from incorporation those provisions which related to what was not injurious affection, I think the wording of this subsection is reasonably plain in its meaning. It provides that if the refusal of an interim development application causes the applicant's property to be injuriously affected, the applicant is to be entitled to such compensation in respect thereof as he would be entitled to obtain under the 1931 Act "if such injurious affection had been suffered as a "consequence of the coming into operation of a planning scheme". The reference to the earlier Act is general and is not confined to section 9 thereof. One has to ask what the position would have been if the same claim had arisen under the 1931 Act, and in doing that I can see no justification for regarding some of the relevant parts of that statute and ignoring others. It would be highly anomalous if injurious affection caused by the restrictions imposed by the refusal of an interim development application could be the subject of compensation while the same injurious affection caused in the same way by the operation of a perfected planning scheme could not, and I cannot but feel that section 6 (4) was drafted as it is in order to avoid such a result.

As to question (2): on the assumptions made in this question I think it, also, must receive an affirmative answer. A good deal was made of the fact that section 10 (2) begins with the words "Property

"shall not be deemed to be injuriously affected by reason of. . . ." and not "Property shall be deemed not to be injuriously affected by reason "of. . . .". This was said to be a distinction of importance. Had the latter words been used, then the right to compensation would have been definitely excluded in cases coming within the subsection; but, the effect of the words actually used, the argument continued, was quite different in that their natural meaning, as respects such cases, is not to exclude compensation but to negative any presumption of injurious affection: in other words, where the conditions of the subsection are satisfied, injurious affection has to be proved and cannot be presumed. The difficulty about this submission is that, since injurious affection, of whatever kind, is a matter of proof and not of presumption, it makes the subsection otiose and of no practical effect. On this account I think the opening words of the subsection must be read as meaning "Property shall be deemed not to be in- "juriously affected. . . .": and that construction would clearly defeat the appellant's claim if the subsection were otherwise applicable.

Next, as to question (3): section 10 (2) contains two relevant conditions—(i) the injurious affection must be caused by the operation of provisions inserted in a planning scheme which, inter alia, "pre- "scribe the height or character or user of buildings," and (ii) the Ministry, having regard to the nature and situation of the land affected by the provisions, must consider them "reasonable for the "purpose". On the views I have already expressed, I think one must approach this subsection, for the purposes of section 6 (4) of the Act of 1944, on the basis that the refusal of the interim development application and the restrictions on which such refusal is grounded are provisions, or the equivalent of provisions, which have been inserted in a planning scheme. This is a notional process, but I see no alternative to it if, as I have held, section 6 (4) attracts section 10 (2) as well as the other parts of the Act of 1931 which deal with compensation.

Proceeding on this basis, I think the first condition of section 10 (2) must be held satisfied, for the rejection of the appellant's application is the result of the respondents adopting restrictions for the site in question which relate to "the height or character or user of buildings". To fulfil the second condition on the same notional basis it must be shown that having regard to the nature and situation of the land the Ministry considers these restrictions "reasonable for the purpose", and that, in my opinion, means reasonable for the purpose of a planning scheme in which provisions to the same effect have been inserted.

Now what Mr. A. P. Fitzgerald had to say on this topic—and in this he was merely acting as the mouthpiece of the Ministry—appears from the letter of Mr. Ronald Green which, after mentioning the Acts of 1931 and 1944, states the Ministry's view as being: ". . . . that the "decision on the application of O. D. Cars, Ltd., made by the "Corporation at its meeting held on 1st March, 1954 was reasonable "and was based on considerations which, if included in a scheme "formulated under the above-mentioned Acts, would be approved by "the Ministry." I think it very likely that the Ministry intended to express a view which would satisfy what I have referred to as the second condition of section 10 (2) and that it thought it had done so. I agree, however, with the court below in thinking that the view actually expressed did not satisfy that condition. Apart altogether from any question as to the steps taken to prove this view, it was not enough to say that the Ministry thought the respondents reasonable in their decision and that it would approve a planning scheme containing the restrictions on which that decision was based. On the hypothesis of an existing planning scheme the Ministry's general approval thereof must be assumed, as such approval is required by section 2 (2) of the Act of 1931 before there can be a planning scheme. What the second condition of section 10 (2) calls for is the consideration of a question which remains open after a scheme has been made and which is not necessarily concluded by the approval of that scheme. At the earlier stage of approval the Ministry's consideration of the draft scheme will, almost inevitably, have been on broad lines. What it has to direct itself to under section 10 (2) is something more pointed and specific. It is whether the restrictive provisions which are deemed, in the notional process rendered necessary by section 6 (4) of the Act of 1944, to be in a perfected planning scheme are reasonable for its purpose "having regard to the nature and situation of the land "affected". The Legislature has undoubtedly contemplated that a scheme might have gained general approval and yet that, *qua* a particular site, some of its provisions might not be reasonable. The Ministry's finding that the respondents were reasonable in their decision may come very near to what the second condition requires, but it seems to me that it does not quite fulfil that requirement. As I read section 10 (2), what the second condition calls for is proof that the Ministry, *having regard to the nature and situation of the land in question*, considers that the restrictions on which the respondents acted were reasonable for the purpose of a planning scheme. That is a rather different question and I am, therefore, of opinion that while the first of the conditions of section 10 (2) is fulfilled, the second is not.

If the issues for decision ended there I would, for the reasons mentioned, uphold both of the answers given by the Divisional Court to the questions submitted, and that would mean that the case would go back and that the arbitrator would award compensation or dismiss the claim according to whether or not the evidence sufficed to show that the second condition of section 10 (2) was satisfied.

Question (4), however, remains. Is section 10 (2) a valid enactment or is it bad as offending against section 5 of the Act of 1920? If valid, the decision of the court below must stand. If bad, the first question submitted by the arbitrator will have to be answered in the affirmative and the second question will not arise.

Question (4) raises a matter of general importance and I make no excuse for quoting subsection (1) of section 5 of the Act of 1920 *in extenso*. It reads: "5. (1) In the exercise of their power to make "laws under this Act neither the Parliament of Southern Ireland nor "the Parliament of Northern Ireland shall make a law so as either "directly or indirectly to establish or endow any religion, or prohibit "or restrict the free exercise thereof, or give a preference, privilege, or "advantage, or impose any disability or disadvantage, on account of "religious belief or religious or ecclesiastical status, or make any "religious belief or religious ceremony a condition of the validity of "any marriage, or affect prejudicially the right of any child to attend "a school receiving public money without attending the religious "instruction at the school, or alter the constitution of any religious "body except where the alteration is approved on behalf of the "religious body by the governing body thereof, or divert from any "religious denomination the fabric of cathedral churches, or, except "for the purpose of roads, railways, lighting, water, or drainage "works, or other works of public utility upon payment of compensation, any other property, or take any property without compensation.

"Any law made in contravention of the restrictions imposed by "this subsection shall, so far as it contravenes those restrictions, be "void."

One, at least, of the issues evoked by this subsection and argued before us may be stated, if not answered, quite simply. It is whether the respondents' refusal of the appellant's application, which admittedly has deprived the appellant of certain proprietary rights of value, constitutes a taking of property within the meaning of section 5 (1).

Two questions which arise on this difficult enactment and are relevant to this appeal, have already been settled so far as this court is concerned. In *O'Neill v. Northern Ireland Road Transport Board*[1], the Court of Appeal (Andrews and Best L.JJ. and Brown J.) held that the prohibition against "....making a law so as either directly or "indirectly.... to take any property without compensation" was not confined by the intervening context to the property of a religious body or denomination, but applied to the property of any owner: see per Andrews L.J., delivering the judgment of the court[2]. If I may say so, I would not wish to question that decision even if free to do so. But it is, of course, binding upon us: moreover, it seems to have been accepted and acted upon by the Imperial Parliament: see section 2 of the Northern Ireland Act, 1947.

Then, in *Ulster Transport Authority v. James Brown & Sons, Ltd.*[3] this court decided that the word "property" in section 5 (1) is not limited to tangible property and includes intangibles such as the goodwill of a business. I need not now rehearse the reasoning for that decision. The point is dealt with by Black L.J.[4] and by myself[5] in our respective judgments.

Another very relevant question is whether the verb "take" in section 5 (1) connotes a taking over, or a taking away. Does it imply an acquisition, a transfer or passing of the property from an owner to a taker? Or does it extend to include a taking away without acquisition, as by dissipation, or destruction or the prohibition of user and enjoyment? This point was debated in this court in the abortive case of *Northern Ireland Road Transport Board v. Benson*[6]. The enactment there challenged was subsection (1) of section 15 of the Road and Rail Transport Act (Northern Ireland), 1935. Andrews L.C.J. and Murphy L.J. took the view that this subsection did not effect a taking for the purposes of section 5 (1) of the Act of 1920. The Lord Chief Justice deals with this in a passage in his judgment which it will be convenient to quote fully as it contains a summary of the decision in *France Fenwick & Co. Ltd. v. The King*[7], which was relied upon strongly by the present respondents. The passage reads thus[8]: "The "only question which remains to be considered is whether section "15 (1) of the Act effected a 'taking' of the goodwill of the defendant's "road motor undertaking without compensation. The words of the "subsection must be carefully noted:

1 [1938] N.I. 104.
2 Ibid. 115, 116.
3 [1953] N.I. 79.
4 Ibid. 127, 128.
5 Ibid. 109, 110.
6 [1940] N.I. 133.
7 [1927] 1 K.B. 458.
8 [1940] N.I. 133 at 145.

" 'A person other than the Board shall not use a motor vehicle on
" 'any public highway for the conveyance of passengers or their
" 'luggage or the carriage of merchandise for hire or reward except
" 'with the consent in writing of the Board and the approval of the
" 'Ministry of Home Affairs.'

"Assuming, as this Court did in *Robb v. Electricity Board for "Northern Ireland*[1], that when section 5 (1) of the Government of "Ireland Act, 1920, prohibits Parliament from making a law to take "property without compensation this means that it shall not authorise "property to be so taken, yet I am of opinion that section 15 (1) of the "Act does not offend against this provision. There is in my judgment "a fundamental and well recognised distinction between taking or "authorising property to be taken without paying compensation, this "involving an actual use or taking of property into possession, and a "negative or restrictive provision which merely involves interference "with the owner's enjoyment of property. This distinction was clearly "taken in *France Fenwick & Co., Ltd. v. The King*[2], to which we were "referred by the learned Attorney-General. That was the case of a "petition of right in which the suppliants were the owners of a vessel "which arrived in the Thames with a cargo of coal during a coal "strike on 2nd April, 1921. Under Regulations which then existed the "Government were empowered to requisition ships, to prohibit the "unloading of ships, and to take possession of stocks of coal. On the "day of the vessel's arrival a Customs officer, acting on instructions, "forbade the discharge of the vessel without permission. The vessel, "accordingly, lay with the coal on board until 21st April, on which "date the Government requisitioned the coal, and the discharge was "ultimately completed on 23rd April. The suppliants, contending "that the vessel had been requisitioned, or, alternatively, that "possession of her had been taken by the Government, claimed "compensation under the Regulations, or, alternatively, at common "law for her detention from 2nd April to 23rd April. It was held by "Wright J., first, that requisition under the Regulations, which in- "volved some effective and positive dominion or control, was not "effected until the 21st, entitling the suppliants to compensation in "respect of two days only. Secondly, dealing with the common law "right to compensation for interference with a subject's property, the "learned Judge said that he would assume that the Crown had no "right at common law to take a subject's property for reasons of state "without paying compensation. 'I think, however,' he said, 'that the

[1] [1937] N.I. 103 at 123. [2] [1927] 1 K.B. 458

" 'rule can only apply (if it does apply) to a case where property is
" 'actually taken possession of, or used by, the Government, or
" 'where, by the order of a competent authority, it is placed at the
" 'disposal of the Government. A mere negative prohibition, though
" 'it involves interference with an owner's enjoyment of property,
" 'does not, I think, merely because it is obeyed, carry with it at
" 'common law any right to compensation. A subject cannot at
" 'common law claim compensation merely because he obeys a law-
" 'ful order of the State.'

"This principle appears to me to be directly applicable to the "present case. Section 15 (1) did not either expressly or impliedly "transfer the possession or ownership of the goodwill of the under- "taking from the defendant to the Board. It did not effect a 'taking' "of the goodwill."

Babington L.J. took the other view and his reasoning will be found in the part of his judgment where he says[1]: "On these facts, "was the defendant's property 'taken' without compensation? The "Board and the Attorney-General contended that the mere ex- "tinguishment of the defendant's undertaking does not amount to "taking it within the meaning of section 5 of the Government of "Ireland Act, 1920. They argued that 'take' means take by way of "transfer and that the property must be actually taken possession of "and used under the statute that is challenged to make it *ultra vires* "under section 5, and that to forbid a man to carry on his business is "merely a prohibition and not a taking. I refuse to place any such "restriction on the section, which says that the Parliament of North- "ern Ireland shall not make a law so as either *directly or indirectly* to "*take* any property without compensation. If this section only con- "templates a taking by way of transfer and actual possession the "word *indirectly* would appear to be superfluous, but I am satisfied "that the Legislature in section 5 was looking at the taking from the "point of view of the person deprived of his property and endeavour- "ing to protect him, while the argument addressed to us is based on a "grammatical construction of the words of the offending statute, "claiming that construing them strictly there is no 'taking.' This over- "looks the reality of the transaction by which the defendant has been "dispossessed of his undertaking, which indeed is admitted, but is "sought to be justified by saying that though it has been put an end "to it has not been '*taken*.' If this is right, death by misadventure "would seem to be the appropriate verdict. But we are not driven to

[1] [1940] N.I. 133 at 156.

"adopt this grammatical construction of the word 'take.' Standing by "itself the word is ambiguous and unless it be used with a qualifying "adverb or in conjunction with some object, it is impossible to give "it a precise meaning. For example, it may mean 'take over' suggesting a transfer of possession, or it may mean 'take away' signifying to "dispossess or confiscate, or it may connote mere destruction as when "the highwayman says: 'Your money or your life,' meaning 'Give me " 'your money or I will take your life.' Shakespeare uses the word in "all these senses when Shylock says: 'You take my house when you " 'do take the prop that doth sustain my house. You take my life " 'when you do take the means whereby I live.' It is not clear in what "sense the word is used in section 5 of the Government of Ireland Act, "1920, but it may be used in a general sense and may mean any act "which deprives or dispossesses a citizen of his property, or which "merely destroys it, as well as those acts which transfer his property "to the state or to others. In order to ascertain its true meaning I "think we must look for the intention of Parliament in so far as we "can gather it from the Act itself and from the common law which "Parliament must be presumed to have been aware of, and to give the "word 'take' a meaning which will carry that intention into effect. In "my view the intention of Parliament was a general one, to protect "the subject from possible spoliation. The mischief aimed at is the "expropriation or confiscation or destruction of any property without compensation, and the section should therefore be liberally "construed so as to give the utmost protection which the language "used will allow. Construing the word in this way, I hold that the "word 'take' means what it says and is effectual to prevent the "defendant's undertaking being closed down under section 15 without "compensation."

In *Brown's* case[1] the question was further debated in this court. On the facts of that suit it did not call for decision, and it was not decided. But two things appear fairly clearly. In the first place, the court was inclined to the view that the majority opinion in *Benson's* case[2] was not binding as the House of Lords had held on appeal, in *Benson v. Northern Ireland Road Transport Board*[3], that the Court of Appeal's decision had been pronounced without jurisdiction. And secondly, while not expressing a final conclusion on the matter, the members of the court in *Brown's* case[1] preferred the dissenting opinion of Babington L.J. from which I have quoted above. In the course of my own

[1] [1953] N.I. 79.
[2] [1940] N.I. 133.
[3] [1942] A.C. 520.

judgment I said[1]: "As at present advised I find the judgment of "Babington L.J. more persuasive than the judgments of the other "members of the Court on this point;" and Black L.J. added these words[2]: ". . . . I would be slow to hold that a taking within the mean- "ing of section 5 necessarily involves the existence of a transferee. "Section 5 was obviously passed for the protection of owners of "property and must be construed from that standpoint. When a "person's property is sought to be taken from him under colour of a "statute it would seem to matter little to him whether the property is "going to be enjoyed by the taker or whether it will be destroyed or "disappear in the act of taking."

These indications of opinion were clearly obiter, but I have reconsidered them in the light of the careful argument addressed to us on the present appeal, and I still think they were right and should be affirmed. In point of law, a decision given without jurisdiction is a nullity and, however persuasive, its reasoning can be no more binding than the decision itself. I am therefore of opinion that we are free to adopt the broader meaning of "take", and my conclusion is that we should do so and hold that the word imports not only a taking over but a taking away such as may be achieved without any transfer or change of ownership or possession.

My reasons for this conclusion follow those stated in the excerpts from the judgments of Babington L.J. and Black L.J. which I have already set out. The main object of the restriction imposed by section 5 (1), which is now in issue, must be the protection of owners of property, and if the effect of the challenged enactment is to cause such owners to lose their property without compensation, the means by which that result is achieved ought not to be a controlling factor in the situation. Like Babington L.J., I think the words "directly or "indirectly" in the earlier part of section 5 (1) also support this conclusion. I cannot regard the real object of these words to be the inclusion of remote as well as immediate consequences. They seem to me to contemplate rather that there may be different ways of achieving a particular purpose, and if that is so, "take" cannot well be read in the narrow sense which found favour with the majority of the Court of Appeal in *Benson's* case[3]. Suppose, for example, that buildings in a city centre, just in front of a public monument of great architectural merit, have been destroyed by enemy action, and that Parliament decides that the prospect thus revealed should be preserved in the interests of the community. Two courses of action are

[1] [1953] N.I. at 111.
[2] Ibid. 128.
[3] [1940] N.I. 133.

open when it comes to implementing this decision by statute. Provision may be made whereby the site will be acquired from the owner by some body obliged to hold it as an open space; or the owner may be prohibited from building thereon or making any use of the site except to lay it out in grass and flowers. If the site is acquired by purchase it is taken directly. If the other alternative is adopted it is surely also taken, though indirectly. From the point of view of the owner the effect is very much the same whichever of the methods is employed for, either way, he has lost his building site. To hold that section 5 (1) was meant to ensure the payment of compensation in the one case but not in the other would lead to so irrational and unjust a result that such an intention ought not to be imputed to the Legislature if, as I am satisfied is the case, the language of the enactment permits the wider construction.

That there should be little guidance on the question under discussion in decisions of the courts of the United Kingdom is not surprising, having regard to the established supremacy of the Imperial Parliament. But the Constitution of the United States raises a comparable problem: see the Fifth and Fourteenth Amendments and, in particular, the provision of the former—".... nor shall private "property be taken for public use without just compensation." In the course of the argument our attention was drawn to a number of decisions of the Supreme Court of the United States which have a bearing on what amounts to a compensatable taking of property. Of the authorities thus cited mention may be made of *Northern Transportation Company of Ohio v. City of Chicago*[1] (damage caused by the erection of a coffer-dam authorised by statute); *Welch v. Swasey*[2], (statutory restriction on height and construction of buildings); *Pennsylvania Coal Company v. Mahon*[3] (prohibition of mining coal under houses etc.); *Village of Euclid v. Ambler Realty Company*[4] (validity of zoning ordinance as to user of land); and, *United States v. Causby*[5].

In this last case the problem presented was, in the words of Douglas J., delivering the opinion of the majority of the court, "whether respondents' property was taken within the meaning of the "Fifth Amendment by frequent and regular flights of army and navy "aircraft over respondents' land at low altitudes". After referring to the public rights in the airspace, Douglas J. continued: "But that "general principle does not control the present case. For the United

1 (1879) 99 U.S. 635.
2 (1909) 214 U.S. 91.
3 (1922) 260 U.S. 393.
4 (1926) 272 U.S. 365.
5 (1946) 328 U.S. 256.

"States conceded on oral argument that if the flights over re-
"spondents' property rendered it uninhabitable, there would be a
"taking compensable under the Fifth Amendment. It is the owner's
"loss, not the taker's gain, which is the measure of the value of the
"property taken."

And, later he added: "The airplane is part of the modern environ-
"ment of life, and the inconveniences which it causes are normally
"not compensable under the Fifth Amendment. The airspace, apart
"from the immediate reaches above the land, is part of the public
"domain. We need not determine at this time what those precise
"limits are. Flights over private land are not a taking, unless they are
"so low and so frequent as to be a direct and immediate interference
"with the enjoyment and use of the land. We need not speculate on
"that phase of the present case. For the findings of the Court of
"Claims plainly established that there was a diminution in value of
"the property and that the frequent, low-level flights were the direct
"and immediate cause. We agree with the Court of Claims that a
"servitude has been imposed upon the land."

The cases just mentioned are but a few of many decisions of the Supreme Court dealing with this and cognate subjects, and it behoves those who, like myself, are not familiar with this substantial body of American case law, to proceed cautiously in seeking to apply, or draw support from, the interesting and often illuminating material which it presents. Yet, without forgetting that, I think it would be safe to say that the authorities I have referred to show that in the United States the trend of decision has been to hold that, for the purposes of the Constitution, there may be a taking of property for which just compensation is payable though the taking is not a taking over but a taking away, as by a prohibition or restriction or some other form of interference.

For these reasons I conclude that the appellant's submission of invalidity is not met by saying that there has been no transfer or taking over from him.

But this does not give an answer to question (4). A formidable issue remains. If it is clear that property may be taken within the meaning of section 5 (1) as the result of some prohibitory or restrictive provision which takes away without taking over, it is no less clear, in my opinion, that it is not every provision of that sort which will cause a taking in breach of that subsection. The reason for this seems to be two-fold, with each aspect closely related to the other. In the first place, it must, I think, be accepted that, wherever the line is

to be drawn, the taking of any proprietary right is not necessarily a taking of property as that word is used in section 5 (1). For instance, to drive one's own motor car is to exercise a proprietary right, but if a competent court forbids that activity it could hardly be said to have taken the owner's "property" unless the expression is used in some special sense and not in its ordinary and natural meaning. If, however, the owner was forbidden, not merely to drive his car, but to use it at all, the situation might conceivably be different in certain circumstances. If I am right in the view that "take" may include a taking which results from the imposition of some restriction or prohibition or other interference with proprietary rights, it would seem to follow that there may be a taking of property within the meaning of the subsection even though the proprietary rights which are taken away do not exhaust all the attributes of ownership. But I doubt if it is possible to find any test of general applicability for ascertaining what proprietary rights are property within the meaning of this enactment, and it is not now necessary for me to make the attempt. Nor, on the conclusion I eventually reach in the present case, need I decide whether the substantial proprietary rights which the appellant has lost do, in point of law, constitute such property. They well may, and for the purposes of this appeal I shall assume, without so holding, that they do.

And, secondly, it must, I think, be conceded that what is property within the meaning of section 5 (1) may be taken away without compensation and yet without offending against that subsection. If it were not so the power to legislate for "peace, order, and good "government" which is conferred upon the Parliament of Northern Ireland by section 4 (1) of the Act of 1920 would be abridged to an unthinkable degree. Within the limits imposed by that Act, its interpretation should be sufficiently liberal to let that Parliament be "mistress in her own house.": see *Edwards v. Attorney-General for Canada*[1]. Suppose, for example, that the preservation of public order calls for the seizing and destruction of all arms and explosives which are unlawfully held without licence. That means a taking away of property, yet if the statute authorising such a procedure had to provide compensation for the owners concerned not only would the maintenance of law and order be gravely impeded, but compensation would be payable for what has never been regarded as compensatable at all. In a community ordered by law some regulation of private rights for the public benefit is inevitable, and constitutional restric-

[1] [1930] A.C. 124, 136.

tions of a general kind have to be read with this in mind. Thus in *Commonwealth of Australia v. Bank of New South Wales*[1] it was held that the injunction contained in section 92 of the Commonwealth of Australia Constitution, 1900, that "trade, commerce, and inter-"course among the States.... shall be absolutely free" would not be breached by legislation which was truly regulatory in character. In the same way it would seem that truly regulatory legislation which is passed in the public interest and is not aimed at taking property without compensation need not constitute a breach of section 5 (1) even though it entails some degree of taking without compensation.

If this difficulty were confined to cases of taking away which were not cases of taking over, it might be regarded as a point in favour of the view that taking over was the only kind of taking referred to in section 5 (1). But the difficulty cannot be thus confined. If the destruction of unlicensed weapons or explosives is not compensatable, neither can the forfeiture of such articles to the Crown, or the fining of the offenders, be compensatable, though these punishments would involve, in a very real sense, a transfer or taking over of property. The Act of 1920 does not prevent the making of laws by which convicted persons may be executed or imprisoned for their crimes: to hold that section 5 (1) prevents such persons being fined or having to suffer the forfeiture of the instruments of their criminality, would produce results so obviously irrational and absurd that Parliament could not have intended such an interpretation. The examples I have given are obvious rather than exceptional instances, and I see no escape from the conclusion that whether the taking of property is a taking over or a taking away, some limitation of the apparent effect of section 5 (1) must be implied as a matter of construction.

What, then, is the nature of this limitation? It may be—I do not put it further—that this depends to some extent on the manner of the taking in question, and I shall therefore seek the answer in relation to a taking away by restriction, prohibition or some other form of interference which is regulatory in nature, and which I shall call, for short, a regulatory taking. I confine myself in that way because the taking with which we are here concerned is of that type. We are not here dealing with "mere" prohibitions or restrictions which are imposed just to prohibit or restrict or as a device for getting property for nothing. We are dealing with prohibitions or restrictions which are imposed as part of a statutory provision for regulating the use of land in the common interest.

[1] [1950] A.C. 235, 309-10.

The United States decisions, already mentioned, deal with a similar problem which, under the Constitution of that country, often means finding a balance between what are there known as the police power and the power of eminent domain. In *Northern Transportation Company of Ohio v. City of Chicago*[1], which was decided in 1879, Strong J., delivering the judgment of the Supreme Court, said: "The "remedy, therefore, for a consequential injury resulting from the "State's action through its agents, if there be any, must be that, and "that only, which the Legislature shall give. It does not exist at "common law. The decisions to which we have referred were made in "view of Magna Charta and the restriction to be found in the "Constitution of every State, that private property shall not be taken "for public use without just compensation being made. But acts "done in the proper exercise of governmental powers, and not directly "encroaching upon private property, though their consequences may "impair its use, are universally held not to be a taking within the "meaning of the constitutional provision. They do not entitle the "owner of such property to compensation from the State or its "agents, or give him any right of action. This is supported by an "immense weight of authority."

In *Welch v. Swasey*[2] the validity of legislation restricting the height of buildings was in issue and the test is thus described by Peckham J.: "The statutes have been passed under the exercise of so-called police "power, and they must have some fair tendency to accomplish, or "aid in the accomplishment of, some purpose for which the Legis- "lature may use the power. If the statutes are not of that kind, then "their passage cannot be justified under that power. These principles "have been so frequently decided as not to require the citation of "many authorities. If the means employed, pursuant to the statute, "have no real, substantial relation to a public object which govern- "ment can accomplish, if the statutes are arbitrary and unreasonable, "and beyond the necessities of the case, the courts will declare their "invalidity."

And, later, he applied these principles in the following passage: "We are not prepared to hold that this limitation of 80 to 100 feet, "while in fact a discrimination or classification, is so unreasonable "that it deprives the owner of the property of its profitable use with- "out justification, and that he is therefore entitled under the Con- "stitution to compensation for such invasion of his rights. The dis- "crimination thus made is, as we think, reasonable, and is justified by "the police power."

[1] (1879) 99 U.S. 635. [2] (1909) 214 U.S. 91.

That was in 1909. In *Pennsylvania Coal Company v. Mahon*[1] the challenged statute forbade the mining of anthracite coal so as to cause the subsidence of buildings used for human habitation where the surface and the underlaying coal were in different ownership. The Supreme Court (Brandeis J. dissenting) held against the enactment. The following excerpts from the judgment of Holmes J., delivering the opinion of the court, in 1922, are instructive: "Govern-"ment," he observes, "hardly could go on if, to some extent, values "incident to property could not be diminished without paying "for every such change in the general law. As long recognized, some "values are enjoyed under an implied limitation, and must yield to "the police power. But obviously the implied limitation must have its "limits or the contract and due process clauses are gone. One fact for "consideration in determining such limits is the extent of the dim-"inution. When it reaches a certain magnitude, in most if not in all "cases there must be an exercise of eminent domain and compensa-"tion to sustain the act."

Then, after a reference to the circumstances of the case, he says: "If we were called upon to deal with the plaintiffs' position alone we "should think it clear that the statute does not disclose a public "interest sufficient to warrant so extensive a destruction of the "defendant's constitutionally protected rights."

And, later, the learned judge adds: "The general rule, at least, is "that while property may be regulated to a certain extent, if regulation "goes too far it will be recognized as a taking.... We are in danger "of forgetting that a strong public desire to improve the public con-"dition is not enough to warrant achieving the desire by a shorter "cut than the constitutional way of paying for the change."

It is also of interest to note the following passage from the dissenting opinion of Brandeis J.: "Every restriction," he said, "upon "the use of property, imposed in the exercise of the police power, "deprives the owner of some right theretofore enjoyed, and is, in "that sense, an abridgment by the state of rights in property without "making compensation. But restriction imposed to protect the public "health, safety, or morals from dangers threatened is not a taking. "The restriction here in question is merely the prohibition of a "noxious use."

In the *Village of Euclid* case[2], decided in 1926, an ordinance prescribing the user of land according to zones was held valid, in so far as challenged, by a majority of the Supreme Court. The opinion of

[1] (1922) 260 U.S. 393. [2] (1926) 272 U.S. 365.

the court was delivered by Sutherland J. who described the nature of the enactment under consideration in a passage which is not without relevance where planning legislation is in question: "Building zone "laws are of modern origin. They began in this country about "twenty-five years ago. Until recent years, urban life was com- "paratively simple; but with the great increase and concentration of "population, problems have developed, and constantly are develop- "ing, which require, and will continue to require, additional re- "strictions in respect of the use and occupation of private lands in "urban communities. Regulations, the wisdom, necessity and "validity of which, as applied to existing conditions, are so apparent "that they are now uniformly sustained, a century ago, or even half a "century ago, probably would have been rejected as arbitrary and "oppressive. Such regulations are sustained, under the complex "conditions of our day, for reasons analogous to those which justify "traffic regulations, which, before the advent of automobiles and "rapid transit street railways, would have been condemned as fatally "arbitrary and unreasonable. And in this there is no inconsistency, "for while the meaning of constitutional guaranties never varies, the "scope of their application must expand or contract to meet the new "and different conditions which are constantly coming within the "field of their operation. In a changing world, it is impossible that it "should be otherwise. But although a degree of elasticity is thus "imparted, not to the *meaning*, but to the *application* of constitutional "principles, statutes and ordinances, which, after giving due weight "to the new conditions, are found clearly not to conform to the "Constitution, of course, must fall." And the test applied in that case appears in a later part of the opinion which reads thus: "If these "reasons, thus summarized, do not demonstrate the wisdom or sound "policy in all respects of those restrictions which we have indicated as "pertinent to the inquiry, at least, the reasons are sufficiently cogent "to preclude us from saying, as it must be said before the ordinance "can be declared unconstitutional, that such provisions are clearly "arbitrary and unreasonable, having no substantial relation to the "public health, safety, morals, or general welfare."

The limitation to be implied in construing section 5 (1) in relation to what I have called a regulatory taking, or, in American phraseology, to the exercise of the police power, cannot always, in my opinion, be satisfactorily ascertained by applying or refining the "pith and substance" doctrine. To come within the category of a regulatory taking and at the same time to avoid the impact of section

5 (1) it seems to me, (i) that the legislation must be directed, in its substance, to furthering the public interest, and (ii) that its restrictions must be reasonable and proper for that purpose. These two tests are, I think, the natural and logical basis for reconciling the power to make laws for peace, order and good government with the requirements of section 5 (1). The first recognises that the promotion of the common weal may, and indeed often must, demand the curtailment of private rights; and the second limits the curtailment without compensation by excluding what goes too far by being arbitrary or unfair or, to use a comprehensive word, unreasonable. This test of reasonableness is not novel. As we have seen, it has been used by the Supreme Court of the United States, and in English law it has been accepted by the courts as a criterion of bye-law validity since, at any rate, the beginning of the 18th century: see *Mitchell v. Reynolds*[1]. It is a test which must, of course, be applied in the light of all the relevant circumstances, including the nature and importance of the legislation's public purpose and the degree of loss or damage which the owners affected by the restrictions will sustain.

If I am right as to these tests the position is that where both are satisfied the legislation—that is to say, the regulatory legislation which works a taking of property without compensation—will not contravene section 5 (1); but if, on the other hand, the tests are not satisfied, the legislation will be invalidated by section 5 (1) in so far as it offends.

That the Northern Ireland Planning Acts of 1931 and 1944 are directed to the furthering of the public interest so as to satisfy the first of these tests cannot, in my opinion, now be denied. Whatever might have been said of this subject in the early years of the present century, the need for planning the use of land in the interests of all is to-day generally recognised, though the methods to be adopted can still cause controversy. Nor, if we turn to the second test, can it be said that the general object of this legislation, the securing, as section 1 (1) of the Act of 1931 puts it, of "proper sanitary conditions, "amenity and convenience in connection with the laying out and use "of the land...." is, by modern standards, other than reasonable and right. The contrary was not suggested before us, and, whatever views there may be as to how far planning should be carried, we have only to survey some of the lamentable consequences of a lack of planning to see the virtues of this statutory purpose.

But in applying the test of reasonableness we cannot stop at this

[1] (1711) 10 Mod. 130, 133.

broad statement of purpose. The Acts in question are enabling Acts and we have to consider not only what they purport to do, but what may be done thereunder; for planning schemes, and the exercise of planning powers, must respect the provisions of section 5 (1) no less than the text of the authorising statutes.

Now, section 10 (2) of the Act of 1931 relates to what may be done under certain specified powers which I have already set out. These powers are conferred by section 5 (2) of that Act in wide terms and it is plain that much that is entirely reasonable may be done pursuant to them. The power to prescribe the space about buildings and to limit the number of buildings may be used to prevent overcrowding and unhealthy living conditions; the power to prescribe the height, character or user of buildings may be made to serve the community in a multitude of ways, as by preserving the existing amenities or natural beauty of a district, preventing nuisance, or promoting the type of building best suited to the needs of the public; and the power to prescribe a standard of net annual value may be exercised so as to protect and encourage a desirable quality of housing.

But if such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably. For example, the power to prescribe the space about buildings or to limit the number of buildings may be so used as to make economic development impossible without any countervailing advantage, or the standard of net annual value may be set so high as to rob the land in question of its only profitable user. And further, the scope of these powers is so wide that, on the views already expressed, their exercise may well amount to a taking of property within the meaning of section 5 (1), wherever the dividing line may lie between proprietary rights which are and those which are not "property". If, then, a planning authority exercises any of the powers to which section 10 (2) relates in a manner which fails to satisfy what I have called the second test by being unreasonable and thereby causes loss or damage which constitutes a taking and to meet which no right to compensation is available, there will, in my opinion, be a breach of section 5 (1).

But how is the question of reasonableness in this field to be determined? In countries observing the rule of law, the validity of an enactment passed by a legislature of limited competence is generally a matter for the established courts. No doubt it would have been possible for the Imperial Parliament, with its sovereign powers, to depart from this practice and to provide that, as respects the legis-

lation of the Parliament of Northern Ireland, such questions should be settled by some special tribunal, or even by some branch of the executive government. But the Act of 1920 has not done this, or anything like it. On the contrary, it clearly contemplates that the determination of constitutional issues of this kind will rest with the courts, including the Judicial Committee of the Privy Council: see sections 49 (c), 50 and 51, and section 53 which enacts that: "Any "decision of the House of Lords or of the Judicial Committee of the "Privy Council as to the validity of any law made by or having the "effect of an Act of the Parliament of Northern Ireland.... shall "be final and conclusive and binding upon all courts."

And if it is for the courts to determine whether or not a Northern Ireland enactment is valid, I think it follows that the same must be said of any justiciable issue on which that question necessarily depends. If, for example, the validity of some section of a regulatory Act is in dispute and the decision turns on whether the restrictions which may be imposed by or under that section are reasonable, in the sense in which I have used the term, the issue of reasonableness is as much a matter for the courts as the larger question to which it is the key. A constitutional prohibition cannot be side-stepped by empowering a government department or an official to do something or come to some determination which could not validly be done or determined on the face of the enabling statute. As Lord Atkin said, in delivering the judgment of the Judicial Committee in the Australian case of *James v. Cowan*[1]: "The Constitution is not to be "mocked by substituting executive for legislative interference with "freedom." See also the decision of the Judicial Committee in *Hughes and Vale Proprietary Ltd. v. State of New South Wales*[2] which held that statutory provisions establishing a public motor vehicle licensing system, under which licences might be granted or refused by an official of the executive in his uncontrolled discretion, contravened section 92 of the Constitution of the Commonwealth of Australia. Those cases, it is true, did not involve the process of adjudication; but in point of principle, I find it hard to see, in this connection, any material distinction between committing to the executive, on the one hand, a purely administrative function and, on the other, a function which is, or ought to be, more judicial in character. Suppose, for example, that a Northern Ireland statute providing for the compulsory acquisition of land for public purposes were to declare that all vacant land bordering a highway and not more than, say, 40 feet in depth,

[1] [1932] A.C. 542, 558.

[2] [1955] A.C. 241.

should be deemed of no value and should not, therefore, be the subject of compensation. It is, in my opinion, quite clear that such a declaration would not stand against a frontager whose strip was of value. It would be a plain contravention of section 5 (1). But suppose that instead of containing that declaration the statute said that no such land would be the subject of compensation if the Ministry concerned considered it to be without value. Would that be good against the owner of land which in fact was of value? I cannot think that it would. To hold otherwise would be to oust the courts from a fundamental jurisdiction and to substitute executive for legislative interference with the constitutional right to compensation.

These considerations call for a further scrutiny of section 10 (2) of the Act of 1931. As we have already seen, this subsection relates to certain planning provisions that may go so far as to cause a taking of property, and enacts, in effect, that no compensation shall be payable in respect of loss caused by such provisions if they are provisions "which the Ministry, having regard to the nature and situation of the "land . . . . considers reasonable for the purpose". If the views I have stated earlier as to what constitutes a taking and as to the tests to determine whether a regulatory taking is in breach of section 5 (1) are correct, these words of section 10 (2) raise an inescapable constitutional issue, for they purport to commit one of the tests of validity—the test of reasonableness—to the executive. If, instead of the words just quoted, the Legislature had simply said "which, having regard "to the nature and situation of the land are reasonable for the "purpose" I would see no ground for questioning the validity of the subsection, for it would then, in effect, be a description of the type of regulatory restriction which does not need to be compensatable in order to accord with section 5 (1). But as section 10 (2) stands, my conclusion is that, for the reasons mentioned above, it was beyond the powers of the Parliament of Northern Ireland to enact. That Parliament cannot undermine the protection which section 5 (1) was designed to afford by authorising a branch of the executive government to decide an issue on which that protection depends. On the authorities, I think it would be difficult to say that the language of section 10 (2) casts on the Ministry anything more than an administrative function to be performed, no doubt, with regard to the matters mentioned in the subsection, but otherwise in the exercise of an unfettered discretion. See, in particular, the decision of the Judicial Committee in *Nakkuda Ali v. Jayaratne*[1]. But the conclusion

[1] [1951] A.C. 66.

I have reached does not rest on this and would be the same even if the Ministry's function fell rather to be regarded as judicial in character. Either way the underlying principle is the same. The Parliament of Northern Ireland, having no power itself to contract the scope of section 5 (1), cannot enable the executive to do so whatever the classification of the function it may be authorised to perform.

On the grounds I have stated I would therefore hold that section 10 (2) of the Act of 1931 is invalid in so far as it empowers the Ministry to consider whether the provisions to which it applies are reasonable. There is no way of severing the subsection, for the Ministry's function thereunder was obviously intended as an essential part of its operation, and this means that the whole subsection falls with the part that offends.

The result of this finding of invalidity is that the Acts of 1931 and 1944 now contain nothing to modify section 9 (1) of the earlier Act or otherwise to preclude the appellant from obtaining compensation in respect of the loss by injurious affection which he has undoubtedly sustained. I would accordingly allow the appeal and substitute for the answers given by the court below to the questions submitted the following:

Q. 1. A. "Yes."

Q. 2. A. "Does not arise."

To avoid the possibility of misunderstanding I wish to make it clear that the decision I have reached does not involve any finding as to whether the restrictions imposed by the respondents on the appellant were or were not reasonable, or as to whether the views of the Ministry reflected the true merits of the position. As I hope will by now be apparent, it has not been necessary to enter upon these questions and I have not done so.

In the ordinary course the case would now go back to the arbitrator for the assessment of compensation. If the parties want that to happen we must order accordingly. But I trust they may be able to come to an agreed figure without the further delay and expense which a remit for assessment would occasion. I venture this suggestion because, owing to an unusual series of misfortunes, this litigation has been pending for so long that the sooner it is concluded the better. And I would only add that, if the parties wish to adopt the suggestion, I see no reason why they should not do so without prejudice to their rights of appeal.

Black L.J.: I have had the advantage of reading and considering the judgment just delivered by the Lord Chief Justice. I agree so entirely with his conclusions and with the reasoning by which he has arrived at them that I do not think that any good purpose would be served by adding any observations of my own.

In addition, however, to the decisions of the Supreme Court of the United States to which the Lord Chief Justice has referred as indicating that that court has interpreted the word "taken" in the Fifth Amendment to the Constitution in the same way as Babington L.J. in *Benson's case*[1] considered that the word "take" should be interpreted in Section 5 (1) of the Government of Ireland Act 1920, I would venture to refer also to the clear statement in the opinion of Roberts J. delivering the opinion of the court in *United States v. General Motor Corporation*[2].

Appeal allowed.

Solicitors for the appellants: *N. & F. Tughan & Walmsley.*

Solicitor for the respondents: *Samuel Love.*

S.M.M.

[1] [1940] N.I. 133.

[2] (1945) 323 U.S. 373, 378.

McGIMPSEY v. O'HARE[1]

Case stated—Jurisdiction of resident magistrate to state a case—Application for certificate of suitability of bookmaker's premises—Not an "information "or complaint"—Betting and Lotteries Act (Northern Ireland), 1957 (5 & 6 Eliz. 2, c. 19), s. 6—Criminal Justice Act (Northern Ireland), 1945 (9 & 10 Geo. 6, c. 15), s. 10.

The decision of a court of summary jurisdiction on the hearing of an application under section 6 (1) of the Betting and Lotteries Act (Northern Ireland), 1957, for a certificate of suitability of bookmaker's premises cannot be the subject of a case stated because it is not the determination of an "information or complaint" within the meaning of section 10 of the Criminal Justice Act (Northern Ireland), 1945.

PRELIMINARY OBJECTION IN POINT OF LAW on a case stated by the Resident Magistrate sitting at Lurgan Petty Sessions.

By notice dated June 4, 1958, Hugh O'Hare stated his intention to apply to the court of summary jurisdiction sitting at Lurgan for a certificate that certain premises in Lurgan were suitable for the purpose of carrying on business as a bookmaker. This notice was addressed to the district inspector of the Royal Ulster Constabulary at Lurgan, to the Lurgan Borough Council, and to the clerk of petty sessions. Notice of objections to the application were lodged by the police, and the district inspector appeared before the resident magistrate when the application came on for hearing. There were no other objections apart from those raised by the police.

The application for a certificate of suitability was made under section 6 (1) of the Betting and Lotteries Act (Northern Ireland), 1957. Subsection (2) of that section provides that notice of such an application is to be given to "such persons (including officers of the "Royal Ulster Constabulary) as may be prescribed by summary "jurisdiction rules and the persons so prescribed shall be entitled to "appear and oppose such application". Subsection (3) of the section also provides that notice of the application is to be inserted in at least two newspapers circulating in the area concerned and entitles any local government elector, residing in the electoral division in which the premises are situate, to appear and oppose the application.

The resident magistrate held against the objections and granted the application for a certificate of suitability. At the request of the district inspector he stated a case on certain points of law for the

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran J.J.: Feb. 23, 24, Mar. 18, 1959.

opinion of the Court of Appeal. When the case stated came on for hearing a preliminary point was taken that the resident magistrate had no jurisdiction to state a case and, accordingly, that the court had no jurisdiction to hear and determine the appeal.

Lowry Q.C. and *McQuitty* for the respondent.

Nicholson Q.C. and *McConnell* for the appellant.

Cur. adv. vult.

Lord MacDermott L.C.J. stated the facts and continued: If the resident magistrate had jurisdiction to state a case it must have been under section 10 of the Criminal Justice Act (Northern Ireland), 1945, which substituted a new section for section 2 of the Summary Jurisdiction Act, 1857, as modified by section 53 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. The relevant portion of this enabling provision runs as follows: "After "the determination by a court of summary jurisdiction of any in- "formation or complaint or of any issue as to jurisdiction arising in "respect thereof any party to such proceeding, if dissatisfied with "such determination as being erroneous in point of law may.... "make an application in writing to the court to state a case....."

Stated shortly, Mr. Lowry's submission was that the respondent's application for a certificate was not an "information or complaint" within the meaning of this enactment. That, in my opinion, poses the true and only issue on this preliminary point.

Apart from authority altogether, it seems to me that in their ordinary meaning the words "information" and "complaint" connote an information or a complaint made against someone. One cannot read the Petty Sessions (Ireland) Act, 1851, without seeing these words used time and again in this sense, and I know of no provision in that Act, or in the other enactments forming the code under which courts of summary jurisdiction are constituted, which would indicate that "information" or "complaint" should be construed more widely and so as to comprehend applications, such as that made by the respondent, which allege nothing against anyone and seek no penalty or redress against or at the expense of another. I do not forget, in this connection, that Mr. Nicholson, for the appellant, placed some reliance on section 37 of the Act of 1851 which reads: "And with a "view to simplify forms, the prosecutor or party at whose instance "the proceeding shall take place, may be termed in such forms the "'complainant' whether he shall be an informant or prosecutor or "otherwise; and the matter of the proceeding may be termed the

" 'complaint', whether founded on an information or otherwise; and "in summary proceedings the decision of the justices may be termed "their 'order', whether the same shall be a conviction or otherwise."

Far from telling against the view I have expressed on the wording of section 10 of the Act of 1945, this section seems to me to lend it some support. By 1851 the business of petty sessions included applications which were not the applications of informants or complainants as those terms were then understood, and it was because of this that section 37 was passed in order to allow of a simplification of the forms to be used. This section did not extend the ordinary meaning of "information" or "complaint": it simply provided that the terms "complainant" and "complaint" could be used *in the forms* to describe more than would otherwise have been appropriate. In other words, it recognised that those words had a limited application.

Turning to authority, the decision of the Irish Court of Queen's Bench in *In re Dillon*[1] was strongly relied upon by the respondent. There, it was held that an application by a publican for a certificate of good character under section 11 of the Spirits (Ireland) Act, 1854, with a view to the renewal of her licence, was not an "information or "complaint" within the meaning of section 2 of the Summary Jurisdiction Act, 1857, and, accordingly, that the justices who refused the application could not be called upon to state a case. In the course of his judgment Lefroy C.J. said[2]: "This is no complaint. "The applicant can go to the local Magistrates, and say, 'I desire " 'from you a certificate to the effect that I have properly conducted " 'my house during the previous twelve months.' But this is only a "matter of fact to be inquired into, not one of 'information or " 'complaint'."

O'Brien J., concurring, said[3]: "I do not think that the application "of a person for such certificate of good character, in order to get a "renewal of his licence, can be considered as 'an information or " 'complaint,' within the terms of that 2nd section; or, that the "inquiry of the Justices into the matter of such applications, or their "refusal to grant the certificate, can be considered as the 'hearing and " 'determination of an information or complaint', as provided for by "that section."

And Hayes J., referring to the words "information or complaint" said[4]: ". . . . but equally in both cases there is contemplated the "existence of a matter in controversy between two parties."

[1] (1859) 11 Ir. C.L.R. 232.
[2] Ibid. 235.
[3] Ibid. 237.
[4] Ibid. 238.

Mr. Nicholson conceded that an application to a court of summary jurisdiction which was altogether ex parte in nature would not be an "information or complaint"; but he contended that, if the application were made pursuant to a statute which contemplated objections and an adjudication by the court thereon as between the applicant and the objectors, it fell within the expression and attracted the jurisdiction to state a case. He further contended that *In re Dillon*[1] was an instance of the altogether ex parte type of application and was not, therefore, an authority against him. I cannot accept this argument. In my opinion the distinction it draws is not a sound distinction. The words of the statute describe the proceedings to which they relate by reference, not to what those proceedings may come to be, but to the steps taken to initiate them—the information or complaint—and I can find no warrant for holding that the true construction of these words depends on what may happen when the proceedings in question get the length of adjudication. Moreover, *In re Dillon*[1] cannot be distinguished in the manner suggested. It is true that the Act of 1854 did not provide for the giving of notice of the application for a certificate or for the making of objections. But there was a general right to object: see *Reg. (Lambe) v. Armagh JJ.*[2]. And, at any rate by the time *In re Dillon*[1] was decided, it is clear that the possibility of opposition was within the contemplation of the Legislature: see the Spirits (Ireland) Amendment Act of 1855 which provided, by section 2, for an appeal to quarter sessions from the refusal of a certificate under section 11 of the Act of 1854, and directed that "in such appeal the party opposing such application shall be re-"spondent....".

For these reasons I am of opinion and hold that the resident magistrate had no jurisdiction to state the case which is now before us. It follows that the appeal cannot proceed and must be struck out.

Curran L.J., who is on circuit, has asked me to say that he agrees with this judgment.

Black L.J.: I agree with the judgment just delivered by the Lord Chief Justice.

The statutory provisions now in force which empower a court of summary jurisdiction in Northern Ireland to state a case for the opinion of the Supreme Court are to be found in section 10 of the Criminal Justice Act (Northern Ireland), 1945. So far as relevant to the point taken by Mr. Lowry in the present case these provisions

[1] (1859) 11 Ir. C.L.R. 232. [2] [1897] 2 I.R. 57.

read: "After the determination by a court of summary jurisdiction "of any information or complaint or of any issue as to jurisdiction "arising in respect thereof any party to such proceeding, if dis- "satisfied with such determination as being erroneous in point of law "may, within seven days from the date on which the determination "was given, make an application in writing to the court to state a "case, setting forth the facts and grounds of such determination, for "the opinion thereon of the High Court....".

By section 2 of the Northern Ireland Act, 1955, the power of the High Court in Northern Ireland to hear and determine appeals by way of case stated under section 10 of the Act of 1945 was transferred to the Court of Appeal and the section now has effect as if for the reference to the High Court there was substituted a reference to the Court of Appeal.

It will be observed that according to the wording of the section the power to apply for a case stated is one which can only arise "after the "determination *of any information or complaint* or of any issue as to "jurisdiction arising in respect thereof".

In this respect section 10 of the Act of 1945 followed the wording of section 2 of the Summary Jurisdiction Act 1857 which conferred a power to apply for a case stated after the hearing and determination by justices *of any information or complaint* which they had power to determine in a summary way.

The Act of 1857 applied both to England and to Ireland. Later, however, so far as England was concerned the circumstances in which a case stated could be applied for were greatly extended by section 33 of the Summary Jurisdiction Act, 1879, which provided that any person aggrieved who desired to question a conviction, order, determination or other proceeding of a court of summary jurisdiction on the ground that it was erroneous in point of law or in excess of jurisdiction might apply for a case stated. This Act did not, however, apply to Ireland where the right to require a case stated could still under the wording of the 1857 Act be exercised only after the determination of an information or complaint, and this is still the position under the Act of 1945. Where the matter in question is not a determination of an information or complaint section 10 of the Act of 1945 simply does not apply.

In the present case what was before the court of summary jurisdiction was an application by the respondent under section 6 of the Betting and Lotteries Act (Northern Ireland), 1957, for a certificate

that the premises in which he intended to carry on business as a bookmaker were suitable for the purpose.

No doubt under section 6 (2) of the Act and rules 4 and 5 of the Summary Jurisdiction (Bookmakers' Certificates) Rules (Northern Ireland), 1958, (S.R. & O. 1958, No. 13) the respondent had to serve notice of his intention to apply for the certificate upon the district inspector of the Royal Ulster Constabulary for the police district in which the premises are situated and also upon the local council, and under section 6 (2) and (3) of the Act the district inspector and the local council and any local government elector residing in the electoral division where the premises are situated could appear and oppose the application. Nevertheless I cannot see how the decision of the court of summary jurisdiction upon the hearing of the application can be described as the determination of an information or complaint so as to bring that decision within the wording of section 10 of the Act of 1945. The words "information or complaint" in section 10 are clearly intended to be descriptive of the mode of initiation of the proceedings. No one would in ordinary parlance describe an application to a court for a certificate of suitability of premises as being either an information or a complaint. And I am quite unaware of any statutory or other authority which would lead one to construe either of the words "information" or "complaint" in section 10 of the Act of 1945 as including such an application.

Nor is the matter devoid of authority. In the Irish case of *In re Dillon*[1] the Court of Queen's Bench held that an application to justices under section 11 of the Spirits (Ireland) Act, 1854, for a certificate of good character to enable the applicant to obtain the renewal of a publican's licence was not an information or complaint within the meaning of section 2 of the Act of 1857 so as to entitle the justices to state a case under that section. The ground of the decision is expressed shortly by Lefroy, C.J.[2]: "We cannot extend our jurisdiction beyond the plain terms of the Act, which are of definite import, and confined to cases of 'information or complaint'."

In view of the very different wording of section 33 of the Summary Jurisdiction Act, 1879, one cannot expect to find assistance from English decisions after the coming into operation of that Act. So far as decisions before that Act are concerned, in *Garetty v. Potts*[3] the Court of Queen's Bench (Blackburn and Lush JJ.) adjudicated upon

1 (1859) 11 Ir. C.L.R. 232.
2 Ibid. 236.
3 (1870) L.R.6 Q.B. 86.

a case stated by justices from a refusal by them of an application by the appellant for a certificate for a licence to keep a beerhouse. The attention of the court was not called, however, to the wording of section 2 of the Act of 1857. But in the precisely similar case of *West v. Potts*[1] decided three days later than *Garetty v. Potts*[2] the court (Mellor and Lush JJ.) ordered the case to be struck out on the ground that a case could not be stated under the Act of 1857 on the refusal of such a certificate, as the Act of 1857 only applied to the determination of justices on "an information or complaint". *West v. Potts* is more fully reported elsewhere[3]. In the Justices of the Peace Report Lush J. is reported as saying: "The case is stated under the 20 & 21 Vict. c. 43, "but if you refer to that statute you will find it is only a determination "of justices in cases which originated by information or complaint "that can be the subject of appeal to this court". So in *Diss Urban Sanitary Authority v. Aldrich*[4] the Court of Queen's Bench (Mellor and Lush JJ.) held that justices had no power to state a case on refusing to make an order authorizing a local authority to enter premises under the Public Health Act, 1875, section 305, inasmuch as this was not a determination of a complaint within section 2 of the Act of 1857. When one turns to the text books one finds these cases quoted as authority. *In re Dillon*[5] and *West v. Potts*[1] in O'Connor's Justice of the Peace, 2nd ed. vol. I, page 346 and *Diss Urban Sanitary Authority v. Aldrich*[4] in Paley on Summary Convictions, 9th ed. page 739.

During the argument reference was made to rule 10 of the Summary Jurisdiction (Bookmakers' Certificates) Rules (Northern Ireland), 1958 (S.R. & O. 1958 No. 13), made by the Summary Jurisdiction Rules Committee. This rule enacts that the provisions of the Summary Jurisdiction Acts (Northern Ireland) and of any rules made or to be made thereunder shall apply to an application for a certificate as if the application were a complaint and the certificate were an order, and as if the applicant were a complainant and any objector to the application were a defendant. Mr. Nicholson, however, admitted that he could not rely on this rule as sufficient to confer a right of appeal from courts of summary jurisdiction by case stated and conceded that the only source in which a right to such an appeal is to be found is section 10 of the Act of 1945. Indeed the wording of rule 10 seems to indicate that the Rules Committee appreciate that an application for a certificate under the Act of 1957

1 (1870) L.R. 6 Q.B. 88 note.
2 (1870) L.R. 6 Q.B. 86.
3 (1870) 23 L.T. 410; 34 J.P. 760.
4 (1877) 2 Q.B.D. 179.
5 (1859) 11 Ir. C.L.R. 232.

is not a complaint as that word is used in the Summary Jurisdiction Acts.

Preliminary objection upheld.

Appeal struck out.

Solicitor for the appellant: *Chief Crown Solicitor.*

Solicitor for the respondent: *John F. McEvoy.*

S.M.M.

SCAMPTON v. COLHOUN[1]

Practice—Pleading—Writ—Indorsement of claim in negligence—Statement of Claim alleging breach of statutory duty—Separate cause of action—Limitation of actions—Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1954 (2 & 3 *Eliz.* 2, *c.* 26), *s.* 4.

The plaintiff issued a writ indorsed with a claim for damages for personal injuries sustained by reason of the negligence of the defendants their servants and agents in failing to provide proper and safe plant and machinery and a safe place of work and a safe system of work. In his statement of claim, which was delivered more than three years after the accident out of which the claim arose, the plaintiff alleged not only negligence but also breach of statutory duty.

Held, that the claim based on negligence and the claim based on breach of statutory duty were separate and distinct claims so far as the operation of section 4 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1954, was concerned, and that consequently the claim based on breach of statutory duty was statute barred and should be struck out.

MOTION to strike out portion of a statement of claim.

The plaintiff, in the course of his employment as a bricklayer, and while employed by the defendants on a building site, received personal injuries by reason of the breaking of a rung of a ladder. The accident happened on August 24, 1955, and on August 12, 1958, he issued a writ claiming damages against the defendants "for personal "injuries, loss and damage sustained by the plaintiff by reason of the "negligence of the defendants their servants and agents, in failing to "provide proper and safe plant machinery, and a safe place of work "and a safe system of work".

The defendants entered an appearance on August 20, 1958, and on January 8, 1959, the plaintiff delivered his statement of claim, of which paragraph 4 was as follows: "The said personal injuries and "loss and damage was caused to the plaintiff by reason of breach of "statutory duty of the defendants, their servants and agents, and by "reason of the negligence of the defendants and their servants and "agents, in providing and maintaining an unsafe ladder, and in "failing to provide and maintain safe and suitable plant, premises "and equipment, and a safe place of work and a safe system of work." The statement of claim went on to refer to regulations 5 and 29 of the Building Regulations (Northern Ireland), 1950.

The defendants moved the court for an order "that so much of the "statement of claim delivered herein by the plaintiff on January 8,

[1] In the Queen's Bench Division before Curran L.J.: Feb. 13, 1959.

"1959, as refers to breach or breaches of statutory duty and of the "Building Regulations (Northern Ireland), 1950, be struck out. . . ." upon the grounds that the same introduced a new and separate cause of action not endorsed upon the writ of summons; purported to introduce and rely upon a cause of action which is and was at the date of filing and delivering the statement of claim statute barred; was frivolous, vexatious, unnecessary, embarrassing and an abuse of the process of the court.

Watt for the applicants. In this case the writ alleges negligence and the statement of claim alleges not only negligence but also breach of statutory duty. The accident happened in August 1955 and the statement of claim, alleging a new cause of action not included in the writ, was delivered in January 1959, more than three years after the accident. Accordingly the claim in respect of breach of statutory duty was statute barred by virtue of section 4 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1954. The position is quite clear on the authorities: *Marshall v. London Passenger Transport Board*[1]; *Lancaster v. Moss*[2].

Nicholson Q.C. and *Babington* for the respondent. This is quite a different sort of application from that which was made in *Marshall's* case[1]. In that case the original writ was faulty and it was sought to add something to the claim by way of amendment. The point here is whether the indorsement on the writ is sufficient to cover two different categories of negligence i.e. common law negligence and breach of statutory duty. The real question must be whether the writ discloses "the nature of the claim made" (Order 2, rule 1). It is not essential "to set forth the precise ground of complaint" (Order 3, rule 2). It is submitted that the writ amply discloses "the substance of "the claim", to use the words of Lord Atkin in *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*[3].

[CURRAN L.J. I do not think that Lord Atkin goes the length of saying that a breach of statutory duty could be described as "negli- "gence". What he says is that facts relied upon to establish a breach of statutory duty could sustain a case in negligence.]

We rely on that case and submit that it carries us quite a long way. On the meaning of "nature of the claim" see *Graff Bros. Estates, Ltd. v. Rimrose Brook Joint Sewerage Board*[4]. No difficulty arises

1 [1936] 3 All E.R. 83, 87.
2 (1899) 15 T.L.R. 476.
3 [1934] A.C. 1, 8.
4 [1953] 2 Q.B. 318.

unless the word "negligence" is treated as having been used in the writ in a strictly technical sense. If that was what Order 2, rule 1, was intended to mean it could easily have been so stated. It is submitted that there is nothing in the Rules of the Supreme Court to require the word "negligence" to be treated in a formal way. It is simply and amply descriptive of the nature of the claim.

Watt in reply. The standards between negligence and breach of statutory duty are quite different. That the Law Reform (Miscellaneous Provisions) Act recognises them as separate causes of action is quite clear from the use of the words "negligence, nuisance or "breach of statutory duty" in section 4 (1). The whole question is put beyond doubt by the judgment of Lord Wright (who also decided *Marshall's* case[1]) in *London Passenger Transport Board v. Upson*[2], where he says: "I think that the authorities . . . . show clearly that a "claim for damages for breach of statutory duty intended to protect "a person in the position of the particular plaintiff is a specific "common law right which is not to be confused in essense with a "claim for negligence."

CURRAN L.J. It seems to me that the introduction of the word "negligence" in the writ is the crux of this case. The effect of section 4 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1954, is that a claim founded on negligence and a claim founded on breach of statutory duty are separate and distinct claims. In the present case the position is that one claim has been brought in time and the other has not. The problem raised is an interesting one, and were it not a question of the intervention of the statute, it would be a rather different matter. It is not without some hesitation that I have reached my decision, but I think the fact that the plaintiff has based his claim specifically on negligence, means that, after the time had expired, he was precluded from introducing something which, so far as the statute is concerned, was a new basis of claim.

Application granted.

Solicitor for the applicant: *Ronald Rosser.*

Solicitors for the respondent: *Montgomery, McDermott & Munn.*

S.M.M.

[1] [1936] 3 All E.R. 83.

[2] [1949] 1 All E.R. 60, 67.

CAVANAGH v. ULSTER WEAVING CO. LTD.[1]

Negligence—Master and servant—Safe system of work—Practice in like circumstances—"Folly" to neglect precautions.

Statutory duty—Factories—"Means of access" or "place of work"—Factories Act (Northern Ireland), 1938 (2 Geo. 6, c. 23), s. 27.

Damages—Assessment by jury—Power of appellate court to set aside award of jury as excessive.

The plaintiff sustained serious injuries while working on the roof of his employers' factory when he fell from a crawling ladder on to a glazed part of the roof. He was severely lacerated and his right arm had to be amputated above the elbow. His work required him to carry a bucket of cement down the ladder, which had no handrail, and at the material time he was wearing rubber boots provided by his employers, but because of water present on the roof the soles of the boots had become slippery.

The plaintiff in his action against the employers claimed damages for (i) negligence, and (ii) breach of statutory duty by reason of contravention by the employers of the provisions of section 27 of the Factories Act (Northern Ireland), 1938. The employers adduced expert evidence, which was not seriously challenged, that the system of work was "perfectly in accord with "good practice". The jury found for the plaintiff and awarded him £6,520 damages, which was reduced to £5,868 in view of a finding of contributory negligence.

Held, by the Court of Appeal (Lord MacDermott L.C.J. dissenting), that there was no evidence upon which a jury could reasonably find that the employers were negligent since the plaintiff had failed to show (i) that what the employers had failed to do was something which was commonly done by other employers in like circumstances, or (ii) that some precaution had been omitted which it would have been folly in anyone to neglect to provide.

Per Lord MacDermott L.C.J. and Sheil J. For the purposes of section 27 of the Factories Act (Northern Ireland), 1938, a place cannot at the same time and for the same person be both a means of access to a place at which that person has to work and also a place of work.

On further appeal *held*, by the House of Lords (reversing the decision of the Court of Appeal), (i) that the evidence as to the general practice of the trade could not be treated as conclusive evidence in favour of the employers, and that accordingly there was evidence of negligence on which a jury could find in favour of the plaintiff; (ii) that the jury's award of damages, though high, was not so extravagant as to entitle an appellate court to interfere.

APPEAL from a judgment entered for the plaintiff in an action tried by Black L.J. with a jury.

[1] In the Court of Appeal before Lord MacDermott L.C.J., Curran L.J. and Sheil J.: March 18, 19, June 16, 1958.

In the House of Lords: Present—Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Jenkins: May 11, 12, 13, June 18, 1959.

On October 27, 1953, the plaintiff met with a serious accident while working on the roof of a factory at Linfield Road, Belfast, which was owned and occupied by his employers, the defendants. The plaintiff was a labourer and his task at the time was to act as helper to a man called Reilly who was engaged in pointing ridge-tiles. This required the use of a cement mix and it was the plaintiff's job to bring the cement up in a bucket from the yard where it was mixed to the part of the roof at which Reilly was working. The weight of a full bucket, some three stone, was a sufficient burden to engage one hand fully and to place certain restrictions on the plaintiff's movements and posture as he made his way along the roof to the place where the cement was needed.

The roof was of a usual factory type. It consisted of a series of transverse ridges, each a pitched roof in itself with one aspect slated and the other glazed and the apex, where the glazing and the slates came together at the top, covered by ridge-tiles. The other apex, the point at the bottom from which the slated aspect of one ridge and the glazed aspect of its immediate neighbour arose, formed a gutter along which it was possible to walk. To get from where he gained access to the roof to where Reilly was at work the plaintiff had to make his way along a path or gangway of planks laid across the transverse ridges. Then, when he came to the ridge, the tiles of which Reilly was pointing, he had to get down into the gutter between that ridge and the next so that he might proceed along the gutter to where Reilly was working on an ordinary ladder placed flat against the roof. To provide a means of getting from the plank gangway which lay across the roof ridges to the gutter below there was a roof ladder, or a crawling ladder as it is also called. This ladder was about 11 feet long. It lay flat against the slated aspect, which was 9 feet 6 inches in length, with one end in the gutter and the other projecting a foot or so beyond the ridge-tiles. It consisted of two lengths of wood, $\frac{7}{8}$ of an inch thick, connected by flat rungs which were about 1 inch thick. The upper surface of each rung was therefore about $1\frac{7}{8}$ inches from the slates. To the plaintiff walking along the plank gangway with his bucket of mix this roof ladder ran down before him to his right and close to the gangway. To get to where he was going he had to step on to the ladder at this point and go down it to the gutter. The slope of the slated aspect, and therefore of the roof ladder, was one of 37° to the horizontal. While he was descending the plaintiff was faced with the glazed aspect of the next ridge. This glazing was carried between metal glazing bars about 2 feet apart and running up from near the gutter to near the ridge-tiles. There were two skins of glass about

1 inch apart. That outside was of obscured "arctic" glass; that inside was of wire-reinforced glass.

The plaintiff had been working on this roof for three or four weeks before the accident and had carried a bucket full of cement down this roof ladder on many occasions. He did so facing the glass and with his back to the slates. This was the ordinary way of making the descent when carrying a burden. With the hands free it would have been possible to crawl down facing the slates, but that was not regarded as a practicable method when a bucket of cement had to be carried in one hand.

The accident happened about 3.30 p.m. In the morning the plaintiff had been wearing shoes, but it became wet in the gutters and the foreman had given him a pair of rubber boots to wear instead. These he had on when injured. On getting to the roof ladder the plaintiff left his bucket of cement down on the plank gangway and stepped on to the second or third rung of the ladder. Then he turned and picked up the bucket and was about to descend to the gulley when, as he described it, "my feet just left me and I hit the glass with my right "side". The plaintiff did not fall through the glass, but he broke it and was severely lacerated and his right arm had to be amputated above the elbow.

The plaintiff alleged negligence and breach of statutory duty against the defendants. The latter cause of action was founded on alleged contraventions of subsections (1) and (2) of section 27 of the Factories Act (Northern Ireland), 1938, and of certain of the Building Regulations (Northern Ireland), 1950. The learned trial judge, Black L.J., held that the Building Regulations relied upon by the plaintiff did not apply and this ruling was accepted. The plaintiff did not allege in his statement of claim that the defendants were negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. At the trial, however, the defendants called as an expert a civil engineer who was asked the question: "How far does this set-up accord with good "practice?" He replied: "For the type of access to building work I "would say that it is perfectly in accord with good practice. I have "very considerable experience of such work on roofs for over twenty "years." The questions submitted to the jury and the answers thereto were as follows:

"1. Were the defendants guilty of negligence?

"ANSWER: Yes.

"2. If the answer to question 1 is 'Yes' was the plaintiff's injury "caused either wholly or partly by the defendants' negligence?
"ANSWER: Partly.

"3. Was there provided so far as was reasonably practicable safe "means of access from the ridge of the roof to the gutter?
"ANSWER: No.

"4. If the answer to question 3 is 'No' was the plaintiff's injury "due either wholly or partly to failure to provide such safe "means of access?
"ANSWER: Partly.

"5. Was the plaintiff liable to fall a distance of more than ten "feet?
"ANSWER: Yes.

"6. If the answer to question 5 is 'Yes' did the place afford "secure foothold and if necessary secure handhold?
"ANSWER: No.

"7. If the answer to question 6 is 'No' was the plaintiff's injury "due either wholly or partly to failure to afford secure foothold "or if necessary secure handhold?
"ANSWER: Partly.

"8. Was the plaintiff's injury due partly to his own fault?
"ANSWER: Yes.

"9. What damages would the plaintiff be entitled to recover on "the basis that the defendants were wholly responsible for the "accident?
"ANSWER: £6,520."

"10. If the answer to question 8 is 'Yes' to what net sum is it just "and equitable that the amount mentioned in the answer to "question 9 should be reduced having regard to the plaintiff's "share in the responsibility for the damage?
"ANSWER: £5,868".

The defendants appealed to the Court of Appeal on the grounds that there was no evidence to support the findings of negligence and breach of statutory duty; that the trial judge was wrong in law in holding that subsection (1) or subsection (2) of section 27 of the Act of 1938 was applicable; and that the damages found were excessive and could not reasonably have been awarded on the evidence.

Harrison Q.C., *Lowry Q.C.* and *Shaw* for the appellants. It is difficult to see, from the plaintiff's evidence, upon what he seeks to blame this accident. The questions which must always be kept in

mind are: "What was the duty of the employer?" and, "In what "respect did he fail to carry out that duty?" An employer does not have to guard against every possible risk. His duty is to come up to the standard of the reasonable practice of the reasonable employer. We rely on the well-known and well-accepted test laid down by Lord Dunedin in *Morton v. William Dixon Ltd.*[1] See also *Paris v. Stepney Borough Council*[2]; *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[3]; *Gallagher v. Balfour Beatty & Co. Ltd.*[4]. When negligence by omission is alleged what has to be proved is (i) a deviation from the ordinary practice in like circumstances, or (ii) that the precaution omitted was one so obvious that it was folly for the employer to neglect it. The word "obvious" is the key word, and it is the precaution which must be obvious. Generally speaking the onus is on the plaintiff to point out what the precaution should have been: *Colfar v. Coggins & Griffith Ltd.*[5].

With regard to the allegation of breach of statutory duty we submit that subsection (1) of section 27 of the Factories Act (Northern Ireland), 1938, is not applicable to the present circumstances: *Dorman, Long & Co. Ltd. v. Hillier*[6]. The subsection does not contemplate movements taken while doing one operation or one set of operations: *Hopwood v. Rolls Royce Ltd.*[7]. If, however, it is held to be applicable, there is no evidence of breach. There was no evidence that a safe means of access was not provided or upon which the jury could reasonably have founded their answer to question 3. So far as the wetness in the gutter was concerned, a transient or temporary condition is not a breach of the obligation to "maintain" a safe means of access: *Leversley v. Firth & Brown Ltd.*[8]. A fortiori it cannot be a breach of the obligation to "provide".

The damages awarded were grossly excessive in this case, and, on any calculation, the amount awarded shows that the jury must have failed to take into account matters which they should have taken into account. Such matters are the ordinary risks of life; the ordinary risks of a working life; and the plaintiff's actual earning capacity since the accident.

McSparran Q.C., *Stewart Q.C.* and *Higgins* for the respondent. The common law demands that employers should take reasonable care to lay down a safe system of work for their employees: *General*

1 [1909] S.C. 807, 809.
2 [1951] A.C. 367, 382.
3 [1956] A.C. 552.
4 [1951] S.C. 712, 716.
5 [1945] A.C. 197, 203.
6 [1951] 1 All E.R. 357.
7 (1947) 176 L.T. 514, 517.
8 [1953] 2 All E.R. 866.

Cleaning Contractors Ltd. v. Christmas[1]. An employer seeking to rely on a common practice must show that the circumstances are similar to his own in all material respects: *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[2]. The appellants, therefore must establish that there is a common practice in relation to this particular operation, i.e. carrying a bucket of cement down a roof ladder wearing wet rubber boots. Only where a regular system is established is there any onus on the plaintiff to prove that his case is different.

In relying on the absence of a handrail we are not saying that the normal practice is to have one and that therefore the omission is proof of negligence. What we are saying is that the danger of the plaintiff falling and being severely injured was one which the employer could and should have foreseen: *Harris v. Brights Asphalt Contractors Ltd.*[3].

In a case like the present, and taking into account the decisions in *Dorman, Long & Co. Ltd. v. Hillier*[4] and *Hopwood v. Rolls Royce*[5], it would be possible to argue endlessly whether the place where the plaintiff met his accident was a means of access or a place of work. In the circumstances, where the plaintiff's duties included carrying, the only reasonable construction is that the place was both. If that construction were not possible there would be many cases in which the provisions of section 27 of the 1938 Act would be rendered nugatory.

The onus on an appellant who seeks to have the verdict of a jury set aside is a heavy one: *Metropolitan Railway Co. v. Wright*[6]. It has to be shown that the verdict was so unreasonable that it was one which no twelve reasonable men might find. The appellants' case falls very far short of that. All the authorities show that the verdict of a jury cannot lightly be interfered with: *Mechanical and General Inventions Co. Ltd. v. Austin and the Austin Motor Co.*[7]; *Bocock v. Enfield Rolling Mills, Ltd.*[8]. On reviewing the amount of an award of damages: see the judgment of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd.*[9] Even where there is no jury the effect of having heard and seen the witnesses must be taken into account: *Clarke v. Edinburgh and District Tramways Co. Ltd.*[10];

1 [1952] A.C. 180, 194.
2 [1956] A.C. 552.
3 [1953] 1 Q.B. 617.
4 [1951] 1 All E.R. 357.
5 (1947) 176 L.T. 514.
6 (1886) 11 App. Cas. 152.
7 [1935] A.C. 346, 358.
8 [1954] 3 All E.R. 94.
9 [1942] A.C. 601, 616.
10 [1919] S.C. (H.L.) 35.

Powell v. Streatham Manor Nursing Home[1]; *Thomas v. Thomas*[2]; *Kinloch v. Young*[3].

Cur. adv. vult.

LORD MAC DERMOTT L.C.J. stated the facts substantially as set out above and continued: I shall deal first with the issue of common law negligence. The general nature of the relevant obligation is clear. It is the master's duty "to take reasonable care for the safety of his workmen": per Lord Wright in *Wilsons & Clyde Coal Co. Ltd. v. English*[4] The jury found that that duty had not been discharged and the question is, not what this court would have done, but whether twelve reasonable men might have come to that conclusion. This seems to me to depend on whether such a body might, on the material available, have decided each of three points adversely to the defendants. These points, which I shall deal with separately, may be stated as follows.

(i) Was the means provided by the defendants for enabling those laden like the plaintiff to get from the plank gangway to the gulley dangerous? On the facts of the case I have no doubt that a reasonable jury would have been amply justified in giving an affirmative answer to this question. The means provided presented the descending workman with, at any rate, two appreciable risks which together constituted a grave danger.

In the first place, the footing afforded by the roof ladder predisposed the workman to a fall. The steep downward slope had to be negotiated without any foothold of a kind to ensure a firm balance or any handhold by which a fall might be checked or prevented. Committed, because of his burden, to going down face first, the workman, if he did not adopt the admittedly dangerous method of walking down with his soles on the rungs, could only find support for a part of each foot. He could put his heels on the rungs and leave his soles in the air and more or less horizontal, or he could—as the plaintiff says he did –place his insteps on the rungs, with his soles more or less parallel to the slates and his weight partly taken by the front of the heels of his boots. Whatever the method adopted, much would depend on the precision with which the workman stepped. A slip could easily result from some slight misplacement of a foot which would be of little consequence on a horizontal step of adequate

1 [1935] A.C. 243.
2 [1947] A.C. 484.
3 [1911] S.C. (H.L.) 1.
4 [1938] A.C. 57, 84.

dimensions, and a momentary loss of balance would be hard to regain with such a limited footing and no handhold available.

And, secondly, a slip or fall on the roof ladder—no matter how caused—was almost certain to bring the workman against the glass at the bottom and so expose him to the risk of the injuries it could inflict if broken. Once he fell there was no wire netting or other device to save him from the breakable glass. The reinforced glass was inside and could only be reached after the breakable glass had been broken. This, I think, must be regarded as the outstanding danger of the situation. It was so grave and obvious that a reasonable jury could not well think otherwise.

(ii) Could the risks described at (i) above have been avoided or appreciably diminished? Here again, I have no doubt that there was sufficient material before the jury to justify an affirmative answer. While it is true that the evidence adduced by the plaintiff contains suprisingly little in the way of constructive suggestions for meeting the risks I have mentioned, steps of appropriate width and depth or a handrail to one side of the roof ladder would have been obvious measures for dealing with the first of them, and I cannot accept the view that a jury is precluded from regarding an obvious danger as avoidable merely because the plaintiff has not proved the nature or detail of an obvious form of remedy. In the present case it seems likely that the jury thought that some way of steadying the descent should have been provided, for they found the plaintiff at fault, and the only possible fault on his part that I can discern lies in the fact that he went to go down with the bucket in his left hand instead of transferring it to his right and using his left to hold on to the plank gangway. That would have afforded some support, but the grip would have been awkward and there is no suggestion that the planking was ever intended to serve this purpose. It is, however, in relation to the danger of falling against the glass that the jury had most to go upon for it so happens that Mr. Bowden, the defendants' engineer, agreed on cross-examination that—"It wouldn't be difficult to put a "protection along the glazing bars to catch a man if he fell". I am not to be taken as saying that, without that answer, the jury could not have arrived at the same conclusion regarding such a grave and apparent danger. But if, as may well be, the jury found that the plaintiff's injuries could have been avoided by shielding the glass opposite the roof ladder, that answer, in my opinion, puts their right to reach such a conclusion beyond all doubt or question.

In assuming points (i) and (ii) to be answered affirmatively, were

the defendants negligent in not taking steps to avoid or abate the risks mentioned? Now, there can be little doubt that the roof in question is a common type of factory roof and that on most such roofs provision of some kind has to be made for getting men with materials to whatever part requires maintenance or repair. There was nothing, however, in the evidence adduced on behalf of the plaintiff to show that the provision made by the defendants fell short of that made by others in like circumstances, while the testimony of the defendants' engineer, given in answer to the question—"How far "does this set-up accord with good practice?", was—"For the type "of access to building work I would say that it is perfectly in accord "with good practice". I am not quite clear if "this set-up" was intended to include the lack of protection from a fall against the glass, but for the purposes of this judgment I shall assume that it was and that the defendants have not fallen short of the common practice at any point.

In these circumstances it was inevitable that the defendants should rely strongly upon the well-known passage in Lord Dunedin's judgment in *Morton v. William Dixon Ltd.*[1] in which he said: "Where "the negligence of the employer consists of what I may call a fault of "omission, I think it is absolutely necessary that the proof of that "fault of omission should be one of two kinds, either—to show that "the thing which he did not do was a thing which was commonly "done by other persons in like circumstances, or—to show that it was "a thing which was so obviously wanted that it would be folly in "anyone to neglect to provide it."

This rule, if it may be so called, must now be read in the light of the commentary made upon it by Lord Normand when he said in *Paris v. Stepney Borough Council*[2]—"It contains an emphatic warning "against a facile finding that a precaution is necessary when there is "no proof that it is one taken by other persons in like circumstances. "But it does not detract from the test of the conduct and judgment of "the reasonable and prudent man. If there is proof that a precaution "is usually observed by other persons, a reasonable and prudent "man will follow the usual practice in the like circumstances. Failing "such proof the test is whether the precaution is one which the "reasonable and prudent man would think so obvious that it was "folly to omit it." The word "folly" is perhaps too much associated with extremes to be an altogether appropriate word in relation to the

[1] [1909] S.C. 807, 809. [2] [1951] A.C. 367, 382.

concept of reasonable care; but I do not think it now causes difficulty. From what Lord Normand said, as adopted by the House of Lords in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[1], it can, in my opinion, mean nothing more than unreasonable. Whatever the approach in the last analysis the test to be applied is still the standard of the reasonable man.

The absence of evidence of a common practice supporting the plaintiff's case and the inference that may be drawn from that circumstance and from the evidence of the defendants' engineer, may well be said to have made the burden of establishing negligence a heavy one for the plaintiff. The conclusion I have reached is, nevertheless, that the jury were fully entitled to find as they did on the issue of negligence. They had before them enough to justify the view that a slip or fall on the roof ladder by a laden workman was a foreseeable event. "There is", said the defendants' engineer, "always "danger on roofs of a man slipping or tripping. I agree that that "danger is accentuated if wearing rubber boots that are wet." They had good ground for believing that a fall on the ladder was likely to mean striking the glass at the foot of the ladder; and they knew, for there was really no dispute about it, that protection from the effects of falling against the glass could have been provided without difficulty. In short, they were dealing with an obvious danger likely to cause grave injury which could readily have been avoided if the appropriate precautions had been taken. In such circumstances I am at a loss to see why the jury should not find the employers who failed to take those precautions lacking in their duty to take reasonable care for the safety of their workmen. Counsel for the defendants conceded, very properly as I think, that if, instead of the glass, there had been a sheer drop on the side of the gutter away from the slates, the defendants would have been negligent if they had omitted to provide a railing or like device to keep those who slipped from falling over. That, he said, would have been an obvious danger. From the point of view of what a reasonable jury might do, I do not think it works any radical change in the situation if one substitutes a wall of breakable glass, capable by its nature of inflicting serious wounds, for a perilous edge. In either case a jury would surely be entitled to say that the danger was an obvious one from which a reasonable employer ought to guard his workmen.

For these reasons I am of opinion that the answer to question 1 must stand.

[1] [1956] A.C. 552.

The next matter for consideration arises on section 27 (1) of the Act of 1938 and the answer given by the jury to question 3. What section 27 (1) says is: "There shall, so far as is reasonably practicable, "be provided and maintained safe means of access to every place at "which any person has at any time to work." The first point here is whether, on the true construction of this subsection the roof ladder was, for the plaintiff, a "means of access" to a place at which he had to work. It was certainly a means of access to where Reilly was working at the ridge-tiles. But was that where the plaintiff's place of work was at the crucial time, or is the correct view that his place of work then was in and over all the parts of the factory which he had to visit and traverse in the discharge of his duties as already described? This is not an easy question and it is clear that the application of section 27 (1) can produce a number of fine distinctions. On the authorities, however, I think the right view is that at the time of the accident the roof ladder was being used as a means of access to one of the places at which the plaintiff had to work. The decision of the King's Bench Division in *Dorman, Long & Co. Ltd. v. Hillier*[1], was cited in support of the contrary view. The facts of that case, however, make it clearly distinguishable from the present. The workman there was engaged in stripping corrugated iron sheets from a roof when he stepped back on to a sheet still in position which was unsafe and fell through it and was killed. It was held that at the time of the accident the workman had arrived at the place of work and that the unsafe sheet was part thereof and could not be regarded as a means of access thereto. In the course of his judgment Lord Goddard C.J. took the law as laid down by the Court of Appeal in *Hopwood v. Rolls Royce Ltd.*[2]. In that case the facts were much more akin to those of the present case. The workman, a fitter, had to complete certain work on a cylinder head, and after that he had to take it down to another part of the shop for inspection by an inspector. While proceeding with a cylinder head to the place where he was directed to deposit it for inspection he stumbled against other heads that had already been deposited and was hurt. The Court of Appeal (Lord Greene M.R. and Asquith L.J., Roxburgh J. dissenting) held that the employers had been guilty of a breach of section 26 (1) of the Factories Act, 1937, which corresponds to section 27 (1) of the Northern Ireland Act of 1938. The material part of Lord Greene's judgment reads thus[3]: "There must be a safe means of access to

[1] [1951] 1 All E.R. 357.
[2] (1947) 176 L.T. 514.
[3] Ibid. 517.

"the particular branch of the man's work on which at the moment he "is about to engage himself. That would exclude movements taken "while doing one operation or one set of operations, and would "confine the section to cases where it can truly be said that if a man "is moving from one branch of his work to another branch of his "work, his route in doing so is a means of access." Here, the plaintiff's work also fell into two branches. He had to get the cement mix in the yard and he had to bring it up from there to where it was to be used by Reilly whose helper he was. In the course of that transit he had to pass down the roof ladder, and in these circumstances I am of opinion that that ladder was a means of access within the meaning of section 27 (1) and that that subsection is, accordingly, applicable.

By their answer to question 3 the jury found the defendants had contravened section 27 (1) in that they had not "provided so far as "was reasonably practicable safe means of access from the ridge of "the roof to the gutter". For the reasons already mentioned in dealing with the issue of common law liability, particularly in relation to the points I have numbered (i) and (ii), I think the jury had certainly evidence on which they could reach this conclusion, and I am therefore of the view that the answer to question 3 must also stand.

The next issue for consideration arises on section 27 (2) of the Act of 1938. This subsection runs thus: "Where any person is to work at "a place from which he will be liable to fall a distance of more than "ten feet, then, unless the place is one which affords secure foot-hold "and, where necessary, secure hand-hold, means shall be provided, "so far as is reasonably practicable, by fencing or otherwise for "ensuring his safety." The jury dealt with this issue in their answers to questions 5 and 6. By their answer to question 5 they found that the plaintiff was liable to fall a distance of more than 10 feet, and in their answer to question 6 they found that the place—which I take to mean the roof ladder as a place of work—did not "afford secure "foothold and, if necessary, secure handhold".

If the plaintiff had gone through the double skin of glass he would thereafter undoubtedly have fallen more than 10 feet before he hit the factory floor. I incline to the view that for the purpose of this subsection the 10 feet must be measured vertically from the point at which the vertical fall starts, though I see no reason why the subsection should not apply merely because the workman may have to roll down a slope for some distance before the vertical fall. On the facts I should myself have thought it very unlikely that a workman falling as the plaintiff did would go through by the outer skin of

glass and the reinforced glass underneath it. But there was evidence both ways as to that, and I cannot say that a reasonable jury might not have found, as this jury did, that the plaintiff was "liable to fall a "distance of more than ten feet".

But if subsection (2) is to apply, the fall must be from a place where the workman is to work, and the question arises whether a fall from the roof ladder can be so described. It may be that for the purposes of the statute the same place can be a place of work and also a means of access, but, like Devlin J. in *Dorman, Long & Co. Ltd. v. Hillier*[1], I doubt if *Hopwood v. Rolls Royce Ltd.*[2] can be regarded as authoritatively establishing the proposition that a place may at one and the same time be both a means of access and a place of work for the same workman. Certainly, I do not think that can be so for the purposes of section 27. Subsection (1) of that section speaks of a means of access to every place at which any person has at any time to work, while subsection (2) is directed to the place of work in contra-distinction, as it seems to me, to the means of access to that place of work. If, then, as I would hold, the plaintiff is entitled to succeed under subsection (1) on the ground that the roof ladder was a means, though not a safe means, of access, he cannot, in my opinion, also rely on the roof ladder as a place of work so as to harness the provisions of subsection (2). For that reason I think the answers to questions 5 and 6 and also to question 7, which rests upon the answer to question 6, are irrelevant and must be disregarded.

There remains the question of damages. The total damages were found to be £6,520. That must, I think, be reckoned a generous figure, for the plaintiff obtained what appears to be steady employment in February 1956, and the loss of earnings actually suffered would not exceed £600. He was, moreover, but 20 years old when injured and will, no doubt, find it easier to adjust himself to his disability than he would if he had been older. But, whatever may be said to minimise the consequences of the accident, the fact remains that the plaintiff, a right handed man, has lost his right arm. For anyone—perhaps most of all for a labouring man—this is a very grievous injury. Not only will the plaintiff's industrial capacity be permanently diminished, but in much that pertains to the enjoyment of life he will be at a disadvantage for the rest of his days. Unlike many claimants, this plaintiff seems to have made no attempt to exaggerate his sufferings or his disability. That, however, should not

[1] [1951] 1 All E.R. 357. [2] (1947) 176 L.T. 514.

tell against him. The jury may have thought none the less of the effects of the accident because they were not emphasised. Indeed, if the jury formed as favourable a view of the plaintiff as the learned trial judge obviously did, they may have felt that his prospects had been above the average and that his loss would be all the greater on that account. We can, of course, only speculate as to the considerations which weighed with the jury; but it is the duty of this court to accept the view of the facts most favourable to the plaintiff, and I think we are entitled to assume that the jury took the view that, for this particular plaintiff, the loss of his arm would prove a heavy and enduring hardship. The courts have always found difficulty in defining closely the conditions in which a jury's award of damages may be set aside, but the broad rule was clearly stated by Black L.J. in this court in *Brennan v. Gale*[1], when he said: "It will be set aside "only if the damages awarded are so large that twelve sensible jurors "could not reasonably have awarded them, or if the court is satisfied "that the jury have taken into account matters which they ought not "to have taken into account or have disregarded matters which they "ought to have taken into account, or, as it has been put in the Irish "cases, if the court cannot find any reasonable proportion between "the amount awarded and the loss sustained." Applying that to the present case I can find no ground for interfering with the jury's measurement of the damages. While I, myself, would have awarded less, there is nothing to show that they regarded extraneous or disregarded material considerations; nor can I hold that the award exceeded what reasonable men might have found, or that, as between it and the loss sustained, no reasonable proportion exists.

While the defendants have succeeded as respects section 27 (2) of the Act of 1938, they have, on the view I take, failed to disturb the other findings against them. I would therefore dismiss the appeal with costs.

CURRAN L.J.: When Mr. Bowden, A.M.I.C.E., B.Sc., was in the witness box, Mr. Harrison asked him the following question: "How "far does this set-up accord with good practice?", to which Mr. Bowden replied, "For the type of access to building work I would "say that it is perfectly in accord with good practice. I have very "considerable experience of such work on roofs for over 20 years". This was the only evidence as to the general practice. In my opinion, with that uncontradicted evidence before them, a jury would not be

[1] [1949] N.I. 178, 183.

justified in finding that the defendants were lacking in reasonable care for the safety of the plaintiff in providing such a set-up. The plaintiff has failed to show, in the words of Lord Dunedin in *Morton v. William Dixon Ltd.*[1], "that the thing which he" (the employer) "did not do was a thing which was commonly done by other persons "in like circumstances". If I am right in this opinion, it follows that the plaintiff, to succeed, had to show that the defendants had omitted to do something, and that, again to quote the words of Lord Dunedin[2], "it was a thing which was so obviously wanted that it would be "folly in anyone to neglect to provide it". I venture to express the view that Lord Dunedin was here merely referring to the plaintiff's onus of proof. He was not saying what the position would be were the defendants, as in the present case, to establish by positive evidence that the employer had done what was commonly done by other persons in like circumstances. If, as Lord Dunedin has said, an employer is liable in negligence for not doing something which was commonly done by other persons in like circumstances, that means that it is proper to accept as a standard of reasonable care what is commonly done by other persons in like circumstances. I find it impossible to reconcile with this proposition the contention, that even where it is established that the defendants have not omitted anything which is commonly done by other persons in like circumstances, nevertheless a jury is entitled to find that it was folly to omit something they think should have been done. This is not, in my opinion, what Lord Dunedin was saying, nor do I understand Lord Normand in *Paris v. Stepney Borough Council*[3] as seeking to give a different meaning to what was said by Lord Dunedin. When Lord Normand says that "the test is whether the precaution is one which "the reasonable and prudent man would think so obvious that it was "folly to omit it", he is not dealing with the effect of positive evidence adduced for the defendant that the employer has not omitted to do anything that is commonly done by other persons in like circumstances. Such a fact is clearly relevant, and, once it is established, it is my opinion that a finding by the jury that it was folly in the defendants to neglect to provide something else, cannot be justified.

When Mr. Bowden in his evidence was answering the question to which I have referred as to "this set-up", he had just given evidence as to the rubber boots and the glass against which the plaintiff fell, and, in my opinion, these circumstances were clearly present to his

[1] [1909] S.C. 807, 809.
[2] Ibid.
[3] [1951] A.C. 367, 382.

mind when he gave the answer that the set-up was perfectly in accord with good practice.

There was in this case no evidence to indicate any difference in circumstances such as were found in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[1], nor was there any admission, or indeed any direct evidence, that the practice relied on was bad.

For the foregoing reasons I would set aside the verdict of the jury given in answer to question 1.

For the same reasons I would set aside the verdict of the jury in answer to question 3.

I respectfully agree with my Lord, the Lord Chief Justice, that the answers to question 5, 6 and 7 are irrelevant and must be disregarded.

If I am right in the conclusions at which I have arrived, it follows that I would set aside the jury's verdict in answer to question 9, awarding damages. It also follows that in my view the answers to questions 2, 4, 8 and 10 are irrelevant and should be disregarded.

I would accordingly allow the appeal, set aside the judgment given and enter judgment for the defendants.

SHEIL J.: The plaintiff in this case has suffered grievous permanent injuries as a result of falling on the roof of the defendants' premises on October 27, 1953, in circumstances which have already been set out in the judgment of the Lord Chief Justice. The plaintiff asserted at a trial before Black L.J. and a jury that his injuries were caused by (a) negligence on the part of the defendants, (b) breach of statutory duty on their part, and (c) also breach by the defendants of section 27 of the Factories Act (Northern Ireland), 1938. In respect of each of those allegations the jury returned answers in favour of the plaintiff but also found that he himself contributed to the accident by his own negligence to the extent of ten per cent. The defendants in this court ask, that the verdict and judgment to the extent that they were in favour of the plaintiff should be set aside and that judgment in the action should be entered for the defendants.

In seeking to have the judgment set aside the defendants have cast on them the undoubtedly heavy onus referred to in the speech of Lord Halsbury in *Metropolitan Railway Co. v. Wright*[2]: "If reasonable men *might* find (not 'ought to' as was said in *Solomon v. Bitton*[3]) the verdict which has been found, I think no Court has

[1] [1956] A.C. 552.
[2] (1886) 11 App. Cas. 152, 156.
[3] (1881) 8 Q.B.D. 176.

"jurisdiction to disturb a decision of fact which the law has confided "to juries, not to judges." I will bear that principle always in mind while dealing with this case nor will I forget that no objection was taken either to the questions left to the jury or to the charge of the learned trial judge.

It is common case that the fault complained of by the plaintiff was one of omission. The dictum of Lord Dunedin in *Morton v. William Dixon, Ltd.*[1] read with the observations on it by Lord Normand in *Paris v. Stepney Borough Council*[2] and by their Lordships in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[3] establishes that for a plaintiff to succeed there should be proof that what the employer did not do was a thing which was commonly done by other persons in like circumstances or that he failed to take a precaution which a reasonable and prudent man would think it obvious that it was folly to omit.

As to the first branch of Lord Dunedin's proposition no case was made in the plaintiff's own case and the furthest the case got in that respect was that Mr. Bowden, an expert witness called for the defendants, agreed that for a man wearing rubber boots which were wet, and who was carrying a bucket of cement, it would be desirable that he should have a handhold. But this answer in no way satisfied the first part of proof now under discussion. It fell far short of the absolute necessity of proof that a handrail was commonly provided by other persons in like circumstances. Many things about this and other jobs might indeed be desirable but the courts are not concerned with what is desirable except when it is also reasonable or as I should say in this part of the case—commonly done. The evidence led for the plaintiff was nowhere directed to show that it was common practice to provide a handrail. There was no evidence of a similar accident and the plaintiff himself had, without mishap, carried out this work in this way many times a day over the four weeks he was employed. And I think it is right here to refer to the phrase in Lord Dunedin's judgment[4] where he speaks of "in like circumstances". As the Lord Chief Justice has said this roof was a usual factory type and I respectfully adopt his description of it. It is indeed remarkable that no suggestion was made of an accident like this though men must have worked and must be working in like circumstances. There was no evidence to go to the jury based on the first part of the proposition.

[1] [1909] S.C. 807, 809.
[2] [1951] A.C. 367, 382.
[3] [1956] A.C. 552.
[4] [1909] S.C. at 809.

I must now consider the second branch of that proposition. Curran L.J. has referred to a question put to, and answer given by, Mr. Bowden. I think reference should also be made to a reply given by this witness to the learned trial judge that "it is reasonable to "come down facing out even without a handrail. I would personally "do so on that pitch". It may be said that the witness was not thinking of a man laden with a bucket of cement but no one asked about that and the witness was purporting to deal with conditions in which men work on roofs like this and surely he cannot have omitted to have had those conditions in mind including the fact that men carry buckets of cement, planks and other gear in that work.

We have to remember that the reasonable and prudent man must be both reasonable and prudent. Some men who would describe themselves as reasonable and prudent would not go on a roof at all; many, if they got on a roof would not use a ladder with or without a handrail. I think the test must be whether a reasonable and prudent man with knowledge of the circumstances, including knowledge that in the usual factory roof a slated slope faced a glass slope, would say as he saw experienced men going up and down these roof ladders without handrails with the familiarity and ease of men using an ordinary staircase that the operation was so dangerous that to permit a man to use the ladders without a handrail showed no regard for the man's safety and welfare even though no accident was ever known to have happened. He must decide, not on sympathy or on the basis that if there had been a handrail there would not have been an accident, but whether on the evidence, in the prevailing circumstances, the provision of a handrail was so needed that he, the reasonable and prudent man, would think it obvious that it was folly to omit to provide a handrail. Where the work involved is to be seen day and daily the reasonable and prudent man must decide in the light of what was being done and by whom it was being done. One cannot regard the event as demonstrating the risk or give undue weight to the fact that a distressing accident has happened –see *Glasgow Corporation v. Muir*[1] per Lord Thankerton, nor substitute for the word "folly" any other word: see Lord Morton's opinion in *Morris v. West Hartlepool Steam Navigation Co. Ltd.*[2].

I have not lost sight of the fact that a fall on this roof could have and, in this case, unfortunately did have, most serious consequences. But I still think that one must first have regard to the danger of a fall because of the absence of a handrail and, as I have indicated, it was

[1] [1943] A.C. 448, 455. [2] [1956] A.C. 552, 558.

neither the usual practice to provide a handrail nor was the absence of such handrail an omission which was so obvious that a reasonable and prudent man would think it obvious that it was folly to omit it, and as to the consequences, a facing slope, not of glass but of bricks or slates, could have caused the plaintiff a fractured finger or arm. Indeed any obstruction at the bottom of the roof as, for instance, a guard rail, might easily have caused quite serious injuries.

We come now to the question of the rubber boots. It is alleged in the statement of claim that the defendants required and permitted the plaintiff to wear rubber boots for the said work. The facts are that the foreman, because of the wetness in the gulley, gave the plaintiff a pair of rubber boots for the plaintiff's greater comfort. It may well be that these boots were the cause of this accident and Black L.J. thought they were a cause, but it is too much to attribute to the defendants responsibility for an accident thus caused.

What I have so far said has been concerned with negligence. If the plaintiff has failed, as I hold he has failed, to establish negligence, I do not think that he can succeed in respect of the alleged breach of statutory duty which was the subject of question 3 where the test is what is reasonably practicable. On the evidence, the method adopted by the defendants was the general ordinary method of access, Mr. Bowden saying it was perfectly in accord with good practice. Having so concluded I find it unnecessary for the purposes of section 27 (1) of the Act to discuss whether the accident happened at the plaintiff's place of work or while he was going to his work.

As to section 27 (2) of the Factories Act (Northern Ireland), 1938, I respectfully agree with the opinion of the Lord Chief Justice that if this ladder was a means of access it was not at the same time a place of work. For the purpose of disposing of the question as to which it was I will assume it was a place of work. To speak of a liability to fall more than 10 feet can only mean liability to fall vertically for that distance and if the evidence given on this point by Mr. McNally and Mr. Bowden is to be believed it was improbable that the plaintiff could fall to the ground (Mr. McNally) and very unlikely (Mr. Bowden). There was thus no evidence that the plaintiff was liable to fall a distance of more than 10 feet. In the result I am of opinion that there was no evidence on any part of the plaintiff's case on which reasonable men might have found a verdict for the plaintiff.

Not the least remarkable feature of the case was that the jury found that the plaintiff was guilty of contributory negligence. Whether I am

right or wrong on the question of the defendants' liability it is clear beyond question that there was no evidence at all of contributory negligence. When the accident happened the plaintiff was descending the ladder in the way he had always done, in a way described by Mr. Bowden as a reasonable way. This matter was not debated in this court and perhaps, therefore, I should not advert to it but I feel constrained to say that such a finding supports the view that the verdict as a whole was not that of reasonable men. My view is that the plaintiff was awarded damages solely because he had suffered serious injuries, that for the reasons stated that award was wrong, and that simply as a sort of consolation to the defendants the plaintiff suffered a reduction of his award.

For these reasons I agree with Curran L.J. that the appeal should be allowed with costs.

S.M.M.

The plaintiff appealed to the House of Lords[1].

Nicholson Q.C., *Stewart Q.C.* and *Higgins* (all of the Northern Ireland Bar) for the plaintiff.

Harrison Q.C., *Lowry Q.C.* and *Shaw* (all of the Northern Ireland Bar) for the defendants.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Kennan v. Murphy*[2]; *Russell v. Moore*[3]; *Metropolitan Railway Co. v. Jackson*[4]; *Qualcast (Wolverhampton) Ltd. v. Haynes*[5]; *Harris v. Bright's Asphalt Contractors Ltd.*[6]; *Place v. Searle*[7]; *Barkway v. South Wales Transport Co. Ltd.*[8]; *Trott v. W. E. Smith (Erectors) Ltd*[9].; *Banbury v. Bank of Montreal*[10]; *Marshall v. Gotham Co. Ltd.*[11]; *Young v. Rank*[12]; *McCarthy v. Coldair Ltd.*[13]; *Adsett v. K. & L. Steelfounders and Engineers Ltd.*[14]; *Taylor v. R. & H. Green and Silley Weir Ltd.*[15].

Their Lordships took time for consideration.

1 The report of the proceedings in the House of Lords is, by the kind permission of the Incorporated Council of Law Reporting for England and Wales, taken from the report in volume 3 of the Weekly Law Reports, 1959.
2 (1880) 8 L.R. Ir. 285, 295, 296.
3 (1881) 8 L.R. Ir. 318, 345.
4 (1877) 3 App. Cas. 193.
5 [1959] 2 W.L.R. 510.
6 [1953] 1 Q.B. 617.
7 [1932] 2 K.B. 497, 514, 515.
8 [1950] A.C. 185.
9 [1957] 1 W.L.R. 1154.
10 [1918] A.C. 626.
11 [1954] A.C. 360.
12 [1950] 2 K.B. 510.
13 [1951] W.N. 399.
14 [1953] 1 W.L.R. 137, 773
15 [1951] 1 Lloyd's Rep. 345.

June 18, 1959. VISCOUNT SIMONDS. My Lords, I have been privileged to read the opinion which my noble and learned friend, Lord Tucker, is about to deliver, and I concur in it. The evidence given by the expert called for the defence in regard to what was called "the "set-up," which was not seriously or, perhaps, at all challenged, was of very great weight, but I cannot say that it was so conclusive as to require the learned trial judge to withdraw the case from the jury. There were other matters also which they were entitled to take into consideration, and it was for them to determine whether in all the circumstances the respondents had taken reasonable care. I do not think that the learned judges of the Court of Appeal were justified in concluding that reasonable men might not find the verdict which this jury found. If I may respectfully say so, I think that the error of the majority of the court lay in treating as conclusive evidence which is not conclusive, however great its weight, particularly where it has to be weighed against other evidence. But that does not mean that the familiar words of Lord Dunedin in *Morton v. William Dixon, Ltd.*[1], which have been so often quoted both in Scottish and English cases, are not to be regarded as of great authority in determining what is in all the circumstances reasonable care. It would, I think, be unfortunate if an employer who has adopted a practice, system or set-up, call it what you will, which has been widely used without complaint, could not rely on it as at least a prima facie defence to an action for negligence, and I would say with the greatest respect to those who think otherwise, that it would put too great a burden on him to require him to prove that the circumstances of his own case were "precisely" similar to those of the general practice that I have assumed. But these are not questions that arise on the present appeal, I am content to move that the appeal be allowed with costs here and below.

LORD TUCKER. My Lords, the evidence before the jury, viewed, as it must be, in the light most favourable to the plaintiff, has been described in detail in the judgment of the Lord Chief Justice in the Court of Appeal in Northern Ireland, and I do not propose to do more than point out what, in my view, the jury may have considered its salient features.

The plaintiff was carrying a bucket of cement, weighing some 3 stone, down a roof ladder laid flat against the slated aspect of a

1 [1909] S.C. 807, 809.

slanting roof. He had come along a gangway of planks laid across the transverse sides of the roof and had put the bucket down on the plank before starting to descend the ladder, facing forwards; having placed his feet in position on the second or third rung of the ladder from the top, he had to turn to pick up the bucket and, in so doing, he slipped and fell a distance of some 6 feet against the sloping glass roof opposite him He was wearing rubber boots which had been provided for him by the defendants in view of an accumulation of water in the gully between the slanting roofs along which he had to proceed after descending the ladder. A pair of boots was put in evidence by the defendants during the plaintiff's evidence without objection, and though never strictly proved by the defendants as being the actual boots worn by the plaintiff at the time of the accident, were accepted by him as similar to those which he was wearing. There was evidence that these boots were in fact two sizes larger than they should have been for a man with feet the size of the plaintiff's. The ladder down which he had to descend was at an angle of approximately 27 degrees, and its rungs were about $1\frac{7}{8}$ inches from the slates of the roof. There was no handrail with which the plaintiff could support himself with one hand as he descended with the bucket in the other hand, nor was there any protection to save him from the glass in the opposite roof if he should slip, which was a contingency made more probable in the case of a man wearing rubber boots two sizes too big with wet soles. The jury had before them a model of the ladder and were given a demonstration of how the boots would fit on to the rungs.

My Lords, in this summary of the facts I have purposely omitted one piece of evidence, viz., that given by an expert called for the defence with regard to practice. It was this evidence which the majority of the Court of Appeal in Northern Ireland considered decisive in favour of the defendants' case. I will return to it later. For the moment I will deal with the submission of counsel for the defendants that, apart from any evidence as to practice, the trial judge should have ruled that there was no evidence of negligence fit to be left to the jury. This submission was based partly on the ground that the plaintiff had never specifically alleged in his pleading that a handrail or handhold should have been provided, nor had he set out precisely what positive safeguards should have been provided, and in part to an answer given by the plaintiff to the judge to the effect that there was no connection between the accident and the rubber boots.

With regard to the pleading, it had been alleged that safe means of

access to his work had not been provided, that he had been required and permitted to descend the ladder whilst carrying a bucket of cement without adequate or any means of supporting or steadying himself, and that a safer system of work had not been provided whereby, inter alia, the plaintiff would not have been required or permitted to use a ladder which, owing to its position and condition, was an unsafe means of communication.

Evidence was given by an expert witness for the plaintiff that there was nothing that a man could hold on to walking down, and the expert for the defence stated in cross-examination that for a man wearing rubber boots which were wet, and carrying a bucket of cement, it would be desirable that he should have a handhold. In this state of the pleadings and evidence I have no doubt that the trial judge would have been wrong if he had withdrawn from the jury the absence of a handrail or handhold as an element proper for their consideration in all the circumstances on this case.

With regard to the rubber boots, the trial judge's report of the evidence shows that the plaintiff, in answer to a question from the judge, said: "There is no connection between the accident and the "rubber boots". It was argued that this answer ruled out the rubber boots from consideration as having any bearing on the case. The judge, in a note at the end of his report, says that the plaintiff, whilst giving his evidence frankly and candidly, sometimes gave his answers without sufficient consideration, and referring specifically to the answer cited above said that if the plaintiff had really addressed his mind to the matter he would probably have answered quite differently. However this may be, the answer should not be considered in isolation. The witness had just previously said: "I say the boots "could have caused the accident". Later he said: "What caused the "accident was me walking in the gully in the wet and the roof ladder "being slippery". Your Lordships have not seen a shorthand note of the evidence, and do not therefore know the precise form of the questions which elicited these answers. The jury saw and heard the witness and were, in any event, entitled to form their own view of the cause or causes of the accident in the light of all the evidence. In my view, neither of the submissions referred to above can be sustained.

My Lords, this brings me to what is a more important part of the case, namely, the evidence as to practice, and the views of the majority of the Court of Appeal as to the effect of this evidence. The plaintiff in his statement of claim had not alleged that the defendants were

negligent in that the system adopted by them for the carriage of cement on the roof was contrary to the general practice of the trade. The defendants called as an expert a civil engineer, who was asked this question. "How far does this set-up accord with good practice?" He answered: "For the type of access to building work I would say "that it is perfectly in accord with good practice. I have very con- "siderable experience of such work on roofs for over 20 years". I would draw attention to the fact that the words "this set-up" came from counsel, and it was never explained precisely what constituted "the set-up", and in particular whether the practice which he described as "good" included the use of rubber boots such as those produced in evidence. It was said that this evidence stood unchallenged, but as I read the note of the cross-examination it looks as if it may have been directed in part, at any rate, to stress the use of the rubber boots as a feature peculiar to the present case to distinguish it from general practice. However this may be, and whatever is the proper view of the effect of Lord Dunedin's well-known words in *Morton v. William Dixon, Ltd.*,[1] it was for the jury to assess the value to be attached to such sketchy evidence as this, given without any explanation as to what was covered by the words "set-up". They may well have considered it insufficient, more especially if they attached importance to the use of wet rubber boots on a ladder of this kind.

Assuming, however, that the practice spoken to should be read as including the use of wet rubber boots on this ladder, what is the bearing of such evidence on the ultimate decision of judge or jury?

My Lords, I have already expressed my views on the value of this kind of evidence in *Morris v. West Hartlepool Steam Navigation Co.*[2], which I need not repeat, but it was not necessary for me in that case to refer to the language of Lord Dunedin in *Morton v. William Dixon, Ltd.*[1]. I would, however, desire to express my agreement with what was said by my noble and learned friend, Lord Cohen, in *Morris's* case[3] where, after reviewing what had been said on this subject in *Paris v. Stepney Borough Council*[4], and considering the language used by Parker L.J. in the case under consideration[5], he said[6]: "I think "that the effect of their Lordships' observations is that, when the "court finds a clearly established practice 'in like circumstances', the

1 [1909] S.C. 807, 809.
2 [1956] A.C. 552, 576; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.
3 [1956] A.C. 552
4 [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
5 [1954] 2 Lloyd's Rep. 507, 518.
6 [1956] A.C. 552, 579.

"practice weighs heavily in the scale on the side of the defendant, "and the burden of establishing negligence, which the plaintiff has to "discharge, is a heavy one". And later he equates the word "folly" as used by Lord Dunedin and Lord Normand to "unreasonable or "imprudent", thereby emphasising that Lord Dunedin could not have been intending to extend the employer's common law liability beyond that which had been laid down in *Smith v. Charles Baker & Sons*[1] and many subsequent cases in this House. To give to the word "folly" any other meaning would necessarily have this result. This is made plain by the submission of the defendants' counsel in the present case to the effect that, even if the evidence might otherwise warrant a finding of want of reasonable care, the case should have been withdrawn from the jury on the ground that, as a matter of law, it could not, in view of the evidence of practice, be held to amount to "folly".

My Lords, I would respectfully accept the statement of the law on this subject in the present case by the Lord Chief Justice (Lord MacDermott) who, it may be observed, was a party to the decision in *Paris v. Stepney Borough Council*[2] in your Lordships' House. Curran L.J., who with Sheil J. formed the majority in the Court of Appeal, took the view that once practice was established this was conclusive in favour of the defendants. He said that where positive evidence is adduced for the defendant that an employer has not omitted to do anything that is commonly done by other persons in like circumstances "such a fact is clearly relevant and once it is "established it is my opinion that a finding by the jury that it was "folly in the defendants to neglect to provide something else cannot "be justified". Counsel for the defendants did not seek to support this as a correct statement of the law.

Sheil J. appears to have considered the system apart from the rubber boots and reached the conclusion that it could not be considered folly to omit to provide a handrail. As to the boots he said: "It may well be that these boots were the cause of this accident and "Black L.J. thought they were a cause, but it is too much to attribute "to the defendants responsibility for an accident thus caused". I do not think the rubber boots can be eliminated from the case. They had to be taken into consideration with all the other circumstances. Furthermore, I do not think the learned judge gave sufficient weight

[1] [1891] A.C. 325; 7 T.L.R. 679. [2] [1951] A.C. 367.

to the fact that he was setting aside a verdict of a jury and not reviewing a decision of a judge sitting alone.

For these reasons I would allow this appeal on the ground that the jury's verdict on common law negligence should not have been disturbed. In these circumstances I do not think it is necessary or desirable to express a concluded view on the defendants' liability under section 27 (1) of the Factories Act (Northern Ireland), 1938, which is the only other ground of liability now relied upon. The question whether the provision of rubber boots constitutes a part of "the means of access" to the place of work raises a question of some difficulty which it may be better to decide if and when it arises in a case in which it is possible to ascertain whether or not the tribunal of fact regarded them as the sole or a contributory cause of the accident in question.

There remains only the question of damages. The defendants contended that the jury's assessment of £6,520 (reduced to £5,868 by reason of the plaintiff's contributory negligence) should be reduced on the ground that it was excessive. The plaintiff's right arm was badly lacerated and after two or three weeks was amputated three inches above the elbow. He suffered much pain during the unsuccessful efforts to save the arm. The stump was healed before he left hospital. He wears an artificial limb and artificial hand. When examined by a doctor in January, 1958, over four years after the accident, he complained of coldness towards the end of the stump. This condition was confirmed by the doctor, who thought it unlikely to improve. He was aged 20 at the time of the accident and was employed as a labourer at £4 15s. 0d. a week. His loss of wages down to the date of trial amounted to £180, by which time he had obtained employment as a gateman at £5 7s. 0d. In addition to the pain and suffering and the permanent diminution in his enjoyment of some of the amenities of life the jury had, of course, to consider what he might reasonably have been expected to earn during a working life of perhaps 45 or 50 years, taking account of the fall in the value of money, the tendency for wages to rise and the possibility of his improving his status in the labour market contrasted with his present position and future prospects in the event of an increase in the number of unemployed. When all these matters have been weighed in the balance and finally evaluated most favourably for the plaintiff, the figure of £6,500 is appreciably higher than I should have thought it proper for a judge to award. But your Lordships are not dealing with the award of a judge with whose estimate of damages an

appellate court, though slow to interfere, is entitled and indeed bound to reconsider by way of rehearing. I do not think that the present award is so extravagant as to compel your Lordships to infer that the jury, properly directed as is admitted, must have taken into consideration matters which were inadmissible or irrelevant and arrived at an estimate which no twelve reasonable men could have reached so as to require your Lordships to order a new trial on the question of damages. On this part of the case also I am in agreement with the view expressed by the Lord Chief Justice.

Since writing the above I have had an opportunity of reading the opinion which is to be delivered by my noble and learned friend Lord Somervell of Harrow, and I desire to express my agreement therewith.

I would accordingly allow the appeal and restore the judgment of the trial judge in accordance with the verdict of the jury.

LORD KEITH OF AVONHOLM. My Lords, I agree that this appeal should be allowed substantially for the reasons given in the speech delivered by my noble and learned friend Lord Tucker. We are concerned here, in my opinion, with an act or acts of commission and it was conceded that, if this were so, much of the argument presented by counsel for the respondents disappears. The plaintiff was, in my opinion, in the circumstances of this case, placed in some peril by the acts of the respondents, his employers. He was far from being an experienced man in roof work. He had not worked on roofs until his employment on this particular job some three or four weeks before the accident. He was faced with carrying a heavy bucket of cement, down a roof (or crawling) ladder, in an upright position on a slope of 37 degrees without any adequate handhold and wearing rubber boots which were wet and would naturally tend to slip from the somewhat precarious grip which his heels had on the rungs of the ladder and which, further, were probably two sizes too large for him. The boots were supplied by the defendants' foreman, who must have had full knowledge of the circumstances in which the plaintiff was working. I am quite unable to hold that there was no evidence on which the jury could hold, as they did, that the defendants were negligent. If this is so, it is unnecessary to consider the statutory breach on which the plaintiff also relied

I would add, however, a few words on the Dunedin formula, as it

was called, in *Morton v. William Dixon, Ltd.*[1], particularly as I was a member of the court which had occasion to consider that formula in *Gallagher v. Balfour, Beatty & Co.*[2]. The dictum of Lord Dunedin was used with reference to an alleged act of omission in providing a safe system of work. In the sphere of negligence, in the relationship of master and servant, I find the border line between acts of omission and acts of commission very fine. It might be said to be an act of commission to put an employee to work in a place which was obviously unsafe. In the present case it might be that giving the plaintiff rubber boots for his work could have been neutralised by providing some countervailing precaution which would exclude any charge of negligence and so it might be suggested that the cause of the plaintiff's injury was an act of omission rather than of commission. The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle. All that Lord Dunedin meant, in my opinion, was that if a plaintiff was complaining of a particular act of omission as constituting negligence, there were two ways in which he might endeavour to show this: by proving that the omission complained of was a precaution commonly undertaken by others in like circumstances, or was so obvious "that it would be folly in "anyone to neglect to provide it". It is on the second alternative that discussion has generally turned. But I see no particular difficulty. There is no magic in the word "folly". It gives the formula the characteristic that was described by Lord Normand in *Paris v. Stepney Borough Council*[3] as "trenchant". But the language could be phrased otherwise without any loss of meaning. Lord Dunedin might equally have said: "It would be stupid not to provide it", or "that no sensible man would fail to provide it", or "that common "sense would dictate that it should be provided". Lord Cooper himself, who was particularly averse from watering down Lord Dunedin's language, on three separate occasions in his judgment in *Gallagher*[4] used "inexcusable" as the equivalent of "folly". With this may be read the passage from Lord Normand's judgment in *Paris v. Stepney Borough Council*[5] that the formula "does not detract "from the test of the conduct and judgment of the reasonable and "prudent man". In *General Cleaning Contractors Ltd. v. Christmas*[6] my noble and learned friend Lord Tucker said: "It is true that in

[1] [1909] S.C. 807, 809.
[2] [1951] S.C. 712.
[3] [1951] A.C. 367, 382.
[4] [1951] S.C. 712, 716, 717, 718.
[5] [1951] A.C. 367, 382.
[6] [1953] A.C. 180, 198; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

"some cases there may be precautions which are so obvious that no "evidence is required on the subject". In *Morris v. West Hartlepool Steam Navigation Co.*[1] Lord Cohen said that he agreed with Parker L.J. that "folly" was not to be read as "ridiculous" and did not think that that was the sense in which Lord Dunedin used it. I refrain from quoting observations in a similar sense from others of their Lordships in the case cited. Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of omission or an act of commission. But where it is an act of omission that is alleged, I think it will be found, in the absence of evidence of practice, that the circumstances will rarely, if ever, lead judge or jury to hold that there was negligence unless the precaution which it is suggested should have been taken is one of a relatively simple nature which can readily be understood and commends itself to common intelligence as something to be required. Lord Dunedin was laying down, I think, no principle of law but stating the factual framework within which the law would fall to be applied.

I think the appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion delivered by my noble and learned friend Lord Tucker and only wish to add some observations on the use of phrases or formulas as superseding in particular circumstances the normal formula of "reasonable care in all the circumstances".

While the doctrine of common employment was part of our law fine distinctions were drawn as to the circumstances in which an employer might be held liable notwithstanding that doctrine. Now that common employment has been abolished those distinctions need no longer be drawn. I suggest, with all respect, that courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I have called the normal formula—that is, reasonable care in all the circumstances—is applied whatever the circumstances. Lord Dunedin's observation was, in its context, clearly only intended to apply where the practice proved was clearly

[1] [1956] A.C. 552, 578.

proved and where the circumstances covered by the practice were precisely similar to those in which the accident happened. There may be many cases in which although the circumstances are not precisely similar evidence of practice should be given some though less weight. In any case the formula seems to suggest, though this cannot have been intended, that if a plaintiff calls no evidence of practice he must establish folly in order to make out a prima facie case. In my view it would be unfortunate if courts had to consider what amounted to folly. I do not pretend to have considered every gloss on "reasonable "care" which may from time to time have been cited as helpful, but speaking for myself I think the fewer the formulas the better will be the administration of this branch of the law in which circumstances in one case can never be precisely similar to those in another.

LORD JENKINS. I concur with the opinion of my noble and learned friend Lord Tucker, with which I am in complete agreement.

I would allow the appeal.

Appeal allowed with costs.

Solicitors: *Neil Maclean & Co. for D. P. Marrinan, Belfast; Goldingham Wellington & Co. for Henry J. Catchpole, Belfast.*

J.A.G.

NORTHERN IRISH TRUST v. KENNEDY[1]

PRACTICE NOTE

Practice—Service of summons out of the jurisdiction—Leave obtained to issue a writ for service out of the jurisdiction—Summons for final judgment—Necessity of obtaining leave to serve summons out of the jurisdiction.

A firm of moneylenders obtained leave to issue a writ for service out of the jurisdiction. On default of appearance a summons for final judgment under Order 13, rule 17, was served by sending the summons by registered post to the defendant's address out of the jurisdiction. When the summons came on for hearing the judge queried whether the application was properly brought, and adjourned the matter to give counsel an opportunity of considering whether leave should not have been obtained before service of the summons out of the jurisdiction. When the matter again came before the court it was argued that once leave had been obtained to issue a writ for service out of the jurisdiction the court was then seised of the matter throughout any subsequent proceedings.

SHEIL J. stated that in his view he had no jurisdiction to hear the summons because leave had not been obtained to serve it out of the jurisdiction, and accordingly he refused the application.

S.M.M.

[1] In the Queen's Bench Division before Sheil J.: Jan, 30. 1959.

LYNN v. BRAND
STEWART v. BRAND[1]
PRACTICE NOTE

Practice—Separate actions arising out of same accident—Application to have both actions tried together—Admission of liability by defendant—No common issue.

A car driven by the defendant was in collision with a car in which the plaintiff in the first action was a passenger. The plaintiff in the second action was a passenger in the defendant's car. Each plaintiff sued the defendant for damages for negligence, but the writ in the first action was issued two months before the writ in the second action. The defendant applied by motion for an order that both actions be tried together as one action and that the second plaintiff be required to deliver a statement of claim within a certain time. On the hearing of the motion counsel for the defendant admitted that there would be no issue as to negligence in either action.

CURRAN L.J. refused the motion on the ground that, liability having been admitted, there was no issue common to the two actions.

S.M.M.

[1] In the Queen's Bench Division before Curran L.J.: June 26, 1959.

JOSEPH MORTON (BANBRIDGE) LTD. v. BOYLE[1]

Practice—Costs—Writ of summons—Payment of debt after issue but before service of writ—R.S.C. Or. 13, *r.* 3—*Or.* 65 *rr.* 49, 51, 52.

A plaintiff claiming a liquidated sum cannot enter judgment by default for his costs of the writ of summons if the debt claimed is paid after issue, but before service, of the writ.

MOTION ex parte for an order directing the proper officer to enter judgment.

The plaintiffs caused a specially indorsed writ of summons, claiming payment of a debt, to be issued against the defendant. The writ was indorsed with the usual four-day costs and indicated that upon payment of the debt and the stated costs within four days all further proceedings would be stayed. After the issue of the writ, but before service, the defendant paid the debt in full. No sum was tendered for costs. The writ was subsequently served by a civil bill officer who explained to the defendant that as the writ had been issued before payment he, the defendant, was liable for the costs. The costs were not paid and the plaintiffs' solicitors wrote to the defendant informing him that he was liable for the costs and that if they were not paid judgment would be entered. No reply was received and the solicitors sought to enter judgment by default for costs. The affidavit of debt disclosed that the debt had been paid in full before service of the writ and the proper officer refused to enter judgment. He then referred the matter to the assistant registrar for directions.

When the matter came before him the assistant registrar took the view that the default procedure laid down by the Rules of the Supreme Court did not apply to cases where a debt is paid before service of the writ and declined to direct the entry of judgment. He stated his reasons in a memorandum for the use of the court.

Murray for the plaintiffs. The point involved is as to the right of a plaintiff claiming a liquidated sum to mark judgment for costs alone, without an application to the court, where the defendant, (a) pays the debt but not the four-day costs after issue but before service of the writ, and (b) does not enter an appearance. The point is of great practical importance and this is a test case.

The plaintiffs are entitled to mark judgment under Order 13, rule 3, without the necessity of applying to the court. The four-day costs indorsed on the writ under Order 3, rule 8, are part of the plaintiff's claim: *Hughes v. Justin*[2]. "If the defendant, after issue of the writ and

[1] In the Queen's Bench Division before Sheil J.: Jan. 30; Nov. 27, 1959.
[2] [1894] 1 Q.B. 667.

"before service, pays the debt but refuses to pay the 'four-day' costs "indorsed on the writ, the plaintiff is entitled to costs as part of his "claim": see The Annual Practice, 1958 ed. p. 1856; *O'Malley v. Kilmallock Union*[1].

[SHEIL J. In that case it appears from the report that the cheque was returned.]

It is clear from the later decisions that the court may make an order giving leave to enter judgment for costs notwithstanding that the debt has been paid before service: *Murphy v. Kearns*[2]; *Simmonds v. Cronin*[3]. Those authorities do not, however, go the length of saying that in such circumstances a plaintiff may enter judgment for costs under Order 13, rule 3, without recourse to the court. It is conceded that the plaintiffs could not mark judgment for "judgment costs" without a court order, but it is submitted that the default procedure applies to four-day costs.

The fact that the case of payment after issue, but before service, is not dealt with in Order 65 should not be interpreted as meaning that Order 13, rule 3, is not to apply to such cases. Order 65 is procedural and is concerned with machinery rather than with entitlement. The words "at the time of service of the writ" in rules 51 and 52 of that Order affect the plaintiff's right to judgment costs, but are not concerned with costs of the writ. So far as the case of payment before service is concerned it would appear that there is a lacuna in Order 65.

[SHEIL J. Do you say that the lacuna is casus omissus as distinct from something deliberately left out?]

It must have been casus omissus. In the absence of express provision in the Rules it cannot be assumed that there was an intention to cut down the scope of the general words in Order 13, rule 3.

The defendant did not appear and was not represented.

Cur. adv. vult.

SHEIL J.: This application raises a question of considerable importance to practitioners and as requested by counsel I have dealt with the matter on general principles and not with particular regard to the facts of this case. In order to understand the point at issue the matters leading up to the application may be stated shortly.

[His Lordship stated the facts and continued:] It was submitted to the assistant registrar, and it has been submitted before me, that

[1] (1888) 22 L.R. Ir. 326.
[2] (1924) 58 I.L.T.R. 29.
[3] (1910) 44 I.L.T.R. 47.

where a writ is issued to recover a debt or liquidated demand the claim is not only for the debt but also for the costs and that the principle underlying Order 13, rule 3, is that a defendant in such an action, who neglects to appear, thereby submits to judgment for the claim, i.e., for the debt and costs, or, if the debt be paid before judgment, for the costs.

The assistant registrar declined to direct the entry of judgment, and to facilitate the plaintiff in this application set forth the reasons for his refusal in a memorandum for the use of the court. Put shortly what the assistant registrar says is:—

The default procedure of this court (i.e. the procedure by which a plaintiff in an action for debt, can obtain judgment, in default of appearance, in the office without recourse to the court) applies only to cases (a) where judgment is sought for a principal sum; or (b) where a principal sum was due at the time of service of writ. In support of this proposition the assistant registrar says that judgment by default under Order 13, rule 3, is limited to cases which come within the provisions of Order 13, rule 16, and Order 65, rules 49 and 51, namely, to cases where a principal sum is due at the time of judgment; otherwise the requisite affidavit of amount due could not be filed and the proper officer would be unable to determine the appropriate scale of fixed costs. He further says that the only other rule under which judgment by default in an action for debt could be entered is Order 65, rule 52, and that to come within that rule the plaintiff must satisfy two requirements namely: (a) the action must be such that if a sum remained due the plaintiff would be entitled to judgment; and (b) an affidavit must be filed averring positively that at the time of service a specific sum was due. As in his view the plaintiff in this present case could not satisfy the requirements of the rules as to default judgments the assistant registrar refused the necessary direction and indicated that costs could only be had pursuant to an order of the court.

The question which I have now to determine is whether the assistant registrar was right in his conclusion that the default procedure of the courts does not apply to cases where a debt is paid after issue and before service of the writ.

What is meant by default procedure? It means a procedure which is laid down by the Rules of Court and which enables a plaintiff in certain circumstances to obtain a judgment in the office expeditiously and cheaply without involving himself in the substantial costs which are incidental to an action in court. It applies, amongst other things,

to an action for debt and can be availed of by a plaintiff, where a defendant fails to enter an appearance or to deliver a defence to a writ. The costs are predetermined and are inserted in the judgment from fixed scales. As I have just said the procedure is laid down by the Rules.

Under the provisions of Order 13, rule 3, a plaintiff in an action for debt is enabled to enter judgment for that debt and costs if the defendant fails to appear.

Order 13, rule 16, provides that before judgment shall be entered "for any debt or liquidated demand under this Order an affidavit "shall be filed specifying the sum then actually due".

Order 65, rule 49, provides that where a default judgment is entered if the plaintiff is entitled to costs the officer (that is the officer by whom such judgment is being entered) shall add "to the "principal sum for which such judgment is marked" certain fixed costs. The rule lays down that the amount of these costs is to be determined by reference to the amount for which judgment is marked.

Rule 51 of the same Order provides that where a judgment by default is being entered for a debt and where it appears by affidavit that a greater sum than that for which judgment is marked was due at the service of the writ, then the officer can calculate the amount of costs by reference to such greater sum.

Rule 52 of that Order provides that where there is no sum outstanding at the time of judgment a plaintiff shall be entitled to enter judgment for his costs provided that the case is one in which he would have been entitled to judgment if a sum had remained due and provided further that an affidavit is filed showing that at the time of service a specified sum was due.

Now what is the effect of these Rules? It is:

1. That in an action for a debt or liquidated demand where the defendant fails to appear, the plaintiff can enter judgment in the office for the sum (not exceeding the amount indorsed on the writ) which he proves by affidavit to be then due and for costs which are determined by the officer by reference to that sum and added by him to the judgment.

2. That in such an action where judgment is sought for a sum less than the amount indorsed on the writ, the plaintiff by filing an affidavit showing that at the time of *service* a greater sum than that for which judgment is sought was due, can have his costs determined by reference to that sum instead of to the sum for which judgment is entered: and

3. That in such an action where no sum remains due the plaintiff can obtain judgment for costs provided that the action is one in which, if any amount were still due, he could have obtained judgment by default and provided also that it is proved by affidavit that at *the time of service* a specific sum was due. The costs are determined by reference to the amount so due at the time of service.

It is clear that rules 49 and 51 of Order 65 contemplate the existence of a principal sum to which "there shall be added" the costs. It is also clear that under these two rules costs are to be determined with reference either to the amount for which judgment is entered, or to the amount due at the time of service. It follows therefore that these rules cannot be applied to the present case, for here there is no sum now due and there was no sum due at the time of service. To obtain the "fixed costs" the plaintiff in this case must bring himself within the terms of Order 65, rule 52, and this he cannot do because one of the conditions precedent to the operation of that rule is that a sum was due at service.

I am not concerned to determine whether the plaintiff is entitled to costs in the present case but whether he is entitled to enter judgment in default of appearance for those costs under the provisions of Order 13, rule 3. I am satisfied that he is not so entitled. Order 13, rule 16, clearly makes the filing of an affidavit a prerequisite to judgment by default under Order 13, rule 3. The affidavit must specify the sum then actually due, that is, due at the time when judgment is sought. If nothing is due no affidavit can be filed. The words "for any debt or liquidated demand" are merely descriptive of the type of action to which the rule applies. Consequently if no affidavit can be filed then no judgment can be obtained under Order 13, rule 3.

I am confirmed in this opinion by the provisions of Order 65, rule 52, under the terms of which a plaintiff who satisfies the conditions imposed by that rule becomes entitled "to enter judgment for "his costs". It seems to me that the key to the construction of Order 13, rule 3, is to be found in the first condition imposed by this rule namely, "In all cases of actions for a liquidated demand, where "the plaintiff would, if *any sum remained due on foot of such demand*, "be entitled to enter judgment by default". How entitled? By the Rules of Court. What rule? Clearly Order 13, rule 3. Why entitled? Because some sum was due on foot of his demand. It is clear from this and from the fact that this is the enabling rule by which a plaintiff must recover his costs if no sum remains due at the time of judgment

that the rule making authority must have considered Order 13, rule 3, inadequate to meet such cases.

It would be odd if a plaintiff whose debt was paid before service could obtain judgment under Order 13, rule 3, whereas a plaintiff whose debt was paid after service must seek judgment under Order 65, rule 52 and as a prerequisite to such judgment must satisfy the conditions imposed by that rule.

If counsel were correct in his submission the plaintiff would be entitled to judgment for costs, but what costs? Clearly not the "fixed costs" because there is no measure by which to ascertain the appropriate scale, nothing is now due and nothing was due at service. Could such costs be taxed? No, for the Taxing Master can only tax if he is given authority under the Rules or by an order of the court. There is no enabling rule and no order for taxation. Therefore the plaintiff would have a judgment for unascertainable costs.

I think one further test can be applied. Assume that the fixed scale of costs could be applied to this present case and that judgment for those costs could be obtained under Order 13, rule 3. The position then would be that a plaintiff in an action for £100 debt whose debt was paid in full before service could obtain costs appropriate to £100, whereas a plaintiff in a similar action, half of whose debt was paid before service, could only obtain costs appropriate to the amount due at service, that is £50.

For all these reasons I am satisfied that the decision of the assistant registrar was correct.

Application refused.

Solicitors for the plaintiff: *Wallace & Co.*

S.M.M.

WHITE v. TRAINOR[1]

Motor vehicle—Driving licence—Person between 17 *and* 21 *licensed under Act of* 1926*—Licence excluding goods vehicles exceeding* 2½ *tons unladen weight—Licence renewed under Act of* 1955*—Whether licensed to drive goods vehicles up to* 3 *tons unladen weight—Motor Vehicles (Traffic and Regulation) Act (Northern Ireland),* 1926 (16 & 17 *Geo.* 5, *c.* 31) *s.* 3(5)*—Road Traffic Act (Northern Ireland),* 1955 (4 & 5 *Eliz.* 2, *c.* 27), *ss.* 3(1) (*e*), 13(1) (*d*), 18(3).

By section 3(5) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, a person aged between 17 and 21 years was disqualified from obtaining a licence to drive a goods vehicle exceeding 2½ tons unladen weight, but under section 18(3) of the Road Traffic Act (Northern Ireland), 1955, such a person may be licensed to drive motor cars which are not "heavy motor cars", "heavy motor cars" being motor vehicles exceeding 3 tons unladen weight.

By section 13(1) (d) (ii) of the Act of 1955 a driving licence may be granted, without a driving test, to an applicant who held a licence issued under section 3 of the Act of 1926 which authorised him to drive "vehicles of the class or "description which he would be authorised by the driving licence applied for "to drive".

On June 28, 1955, the defendant, having attained 17 years, obtained a licence under section 3 of the Act of 1926. On July 16, 1956, the licence was renewed so as to be in force until July 27, 1957; and on July 8, 1957, after the Act of 1955 had come into operation, the defendant, who was still under 21, again applied for and obtained a renewal of his licence until July 27, 1958. The defendant did not then take, nor was he called upon to take any driving test.

The defendant was stopped by the police when he was driving a motor lorry of 2 tons 19 cwt. unladen weight. The policy of insurance in force in respect of the vehicle was operative only if the driver held or had held and was not disqualified from holding a licence to drive such a vehicle.

Held, by the Court of Appeal (Lord MacDermott L.C.J. dissenting), (i) that the defendant had not, after July 1957 held a licence to drive a goods vehicle exceeding 2½ tons unladen weight, for the reason that under section 13(1) (d) (ii) of the Act of 1955 he was only entitled to obtain, without passing a driving test, a licence to drive vehicles of the "class or description" of vehicles which he had been authorised to drive by his licence under the Act of 1926, which category did not include goods vehicles exceeding 2½ tons unladen weight;

(ii) accordingly that he had been guilty of the offence of driving while uninsured.

Per Lord MacDermott L.C.J. By reason of the repeal of the Act of 1926 by the Act of 1955, the licensing authority had no power to impose any restriction upon a driving licence other than those provided for by the Act of 1955; and the renewal of the defendant's licence under that Act authorised him to drive a "class" of vehicles, as defined in section 3(1) (e) of the Act,

[1] In the Court of Appeal, before Lord MacDermott L.C.J., Black and Curran L.JJ. Feb. 16, Mar. 2, June 9, 1959.

namely motor cars, which class includes goods vehicles of up to 3 tons unladen weight.

CASE STATED by the Resident Magistrate sitting at Castlewellan Petty Sessions.

On August 12, 1958, the defendant and respondent was charged at Castlewellan Petty Sessions with two offences, (a) that he had used a motor vehicle on the public highway without there being in force in respect of the vehicle a policy of insurance against third party risks, contrary to section 41 of the Road Traffic Act, 1955, and (b) that he drove a motor vehicle on a public road not being the holder of a licence to drive such a vehicle, contrary to section 12 of that Act.

The following facts were proved or admitted:

(a) the defendant was on July 4, 1958, on the public road driving a motor lorry of 2 tons 19 cwt. unladen weight;

(b) the defendant was the holder of a driving licence issued on June 28, 1955, under the provisions of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, licensing him until June 27, 1956 to drive (a) a motor cycle only (b) a motor car of any class, excluding a mechanically-propelled goods vehicle exceeding 2½ tons unladen weight; on July 16, 1956, the said licence was renewed so as to be in force until June 27, 1957; and on July 8, 1957 it was further renewed so as to be in force until June 27, 1958; it was not further renewed and on July 4, 1958 the defendant did not hold any driving licence which was then in force.

(c) the said motor lorry was the property of Francis Trainor; there was in force a policy of insurance covering any vehicle the property of the said Francis Trainor; the certificate of insurance under the said policy provided that the persons or classes of persons entitled to drive the vehicle were (a) the policy-holder and (b) any other person in the policy-holder's employ driving on his order or with his permission provided the person driving held a licence to drive the vehicle or had held and was not disqualified from holding or obtaining such a licence.

It was contended for the defendant that he had held a licence under section 3 of the Act of 1926 authorising him to drive vehicles of the class designated "motor car", that by virtue of section 3(1) (e) of the Act of 1955, that class had been extended to include vehicles of up to 3 tons unladen weight, and therefore that since the defendant's licence had been renewed by virtue of section 13(1) (d) (ii) of the Act of 1955, he had been licensed to drive vehicles of that weight, and had been properly insured. The complainant submitted that the

defendant's licence was only renewed so as to allow him to drive goods vehicles of up to 2½ tons unladen weight, and could not have been renewed under section 13(1) (d) (ii) of the Act of 1955 except with the same limitation as had been imposed upon it when it was issued under the Act of 1926.

The resident magistrate upheld the contention of the defendant and dismissed both complaints; but, at the request of the complainant, stated this case for the opinion of the Court of Appeal as to whether he had been correct in holding, (a) that by virtue of the provisions of section 13(1) (d) (ii) of the Act of 1955, the driving licence which had been held by the defendant had authorised him to drive a mechanically-propelled goods vehicle of 2 tons 19 cwt. unladen weight and (b) that there had been in force in relation to the user of the motor lorry by the defendant a policy of insurance which complied with the requirements of Part II of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930.

Nicholson Q.C. and *McConnell* for the complainant and appellant.

(The case was then adjourned so that the licensing authority, the Belfast County Borough Council, might be represented).

McQuitty for the licensing authority.

Doyle for the defendant and respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: The net question in this appeal, which is by way of case stated from an order made on August 12, 1958, by the Resident Magistrate sitting at Castlewellan Petty Sessions, is whether Patrick Trainor, the defendant and respondent, was duly licensed to drive a motor lorry, the unladen weight of which was 2 tons 19 cwt., by the driving licence issued to him by the Belfast County Borough Council which was in force for the year ending June 27, 1958. It is important to note that the unladen weight of this lorry exceeded 2½ tons but not 3 tons.

The answer to this question ought to appear from the terms of the licence itself, for it is in the public interest, as the facts of the present case show, that licences for the driving of motor vehicles should be clear and unambiguous so that drivers may be in no doubt as to what they may lawfully do under the licences they hold. In this appeal, unfortunately, the answer cannot be reached so simply. The licence is not clear in its meaning and reference must be made, at some length, to the relevant statutes and orders and to the respondent's history as a licence holder.

By subsection (1) of section 3 of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, the driving of a motor car on a public highway was forbidden unless the driver was licensed for the purpose under that section. By subsection (2) the councils of counties and county boroughs were made licensing authorities for the granting of licences to persons residing in their respective areas who made application therefor in the appropriate manner. And by subsection (5) a person under the age of 21 was disqualified from obtaining a licence to drive certain descriptions of mechanically-propelled vehicles which exceeded $2\frac{1}{2}$ tons in weight unladen. There is no doubt that the motor lorry already mentioned, which the respondent was driving at the material time, came within this provision and that the respondent, while under age, could not have obtained a valid licence to drive it under section 3 of the Act of 1926. In point of fact, the respondent was born on May 21, 1938.

The expression "motor car" as used in section 3 was defined by section 25(1) as having the same meaning as the expression "light "locomotive" had in the Locomotives on Highways Act, 1896, as amended by the Act of 1926; and that means that for the purposes of the latter Act a "motor car" was, as respects a single vehicle, one which was mechanically-propelled and under 3 tons in weight unladen (or such increased weight as might be substituted therefor by regulations under section 6(1) (c) of the Act of 1926).

All the provisions of the Act of 1926 to which I have referred were repealed by the Road Traffic Act (Northern Ireland), 1955, which received the Royal Assent on December 29 of that year and came into operation (in so far as is now material) on October 1, 1956: see S. R. & O. 1956, Nos. 125 and 144. Section 1 of this comprehensive measure introduces the expression "motor vehicles" as the general description of mechanically-propelled vehicles, and section 3(1) divides "motor vehicles" into seven main classes which are therein described. Of these mention must be made of two, namely: "(d) Heavy motor cars; that is to say, mechanically-propelled "vehicles which are constructed themselves to carry a load or "passengers, and the weight of which unladen exceeds three tons:" and "(e) Motor cars; that is to say, mechanically-propelled vehicles "(not being vehicles classified under this section as motor cycles or "invalid carriages) which are constructed themselves to carry a load "or passengers and the weight of which unladen does not exceed "three tons." Of these categories, it will be observed that, apart from the effect of any regulations made under section 6(1) (c) of the Act of 1926, class (e), but not class (d), corresponds generally to the light

locomotives of the Act of 1896 which were the motor cars of the Act of 1926.

Section 12(1) of the Act of 1955 enacts that a person shall not drive a motor vehicle on a road unless he is the holder of a licence to drive a vehicle "of the class or description to which that vehicle "belongs." Section 13 provides for the issuing of driving licences by the licensing authorities who remain the councils of counties and county boroughs as under the Act of 1926. Under subsection (1) of this section a person is entitled to obtain a driving licence from the appropriate licensing authority if he complies with certain conditions, about which no question arises in this case, and "(c) . . . . satisfies the "authority. . . . that he is not disqualified by reason of age or other- "wise from obtaining the driving licence for which he is applying; "and (d). . . . satisfies the authority. . . . that he has either (i) at some "time passed or is exempted from the prescribed test of com- "petence. . . . to drive motor vehicles of the class or description to "which his application relates; or (ii) at some time before the "appointed day held a driving licence under this Act or under "section three of the Act of 1926 authorising him to drive vehicles of "the class or description which he would be authorised by the "driving licence applied for to drive". The appointed day, for the purposes of section 13(1) (d) (ii), was October 1, 1956.

Section 15 relates to the form of licences and subsection (1) thereof enacts that ". . . . where the applicant is subject to any condition or "restriction with respect to the driving of any class or description of "motor vehicle that condition shall be specified in the prescribed "manner on the licence." The prescribed manner seems to be that set out in regulation 21 of S. R. & O. 1956, No. 142, which reads: "The holder of this licence is not authorised to drive. . . . ."

Section 18 of the Act of 1955 must also be mentioned. It provides for restrictions on driving by young persons, and subsection (3) thereof reads as follows: "A person under twenty-one years of age "shall not drive on a road a heavy locomotive, light locomotive, "heavy motor car or motor tractor, other than an agricultural "tractor under two tons and a half weight unladen." It will be noted that this subsection does not relate to motor cars as defined in paragraph (e) of section 3(1) of the Act of 1955, and since October 1, 1956, there has been no statutory provision forbidding the licensing of a person over 17 and under 21 years of age to drive what is now, in the language of this Act, known as a motor car, that is to say, a mechanically-propelled vehicle constructed to carry a load or

passengers and the weight of which unladen does not exceed three tons.

I must now turn to the licensing history of the respondent which spanned the period of transition within which the licensing provisions of the Act of 1926 were replaced by those of the Act of 1955. The respondent's first licence was issued by the Belfast County Borough Council on June 28, 1955, on his application of that date for what was then known as a Class (B) licence, that is to say, a licence to drive a motor cycle or motor car of the kind issued to persons between 17 and 21 years of age. In his application form the respondent stated that he had attained 17 years of age on May 21, 1955. The licence which was then issued licensed the respondent to drive "....a Motor Car of any class, including a Motor Cycle, but "excluding a mechanically-propelled Goods Vehicle exceeding two "and a half tons unladen weight for a period of twelve months from "the 28th day of June, 1955, until the 27th day of June, 1956, "inclusive". On July 16, in the following year the respondent applied for a renewal of this licence and this renewal was granted in the following terms: "This licence.... is hereby renewed so as to be in "force for twelve months ending on the 27th day of June, 1957, "inclusive." This renewal was granted while the material parts of the Act of 1926 were still operative and was current for almost nine months after the Act of 1955 had come into force. The respondent again applied for a renewal on July 8, 1957, and this was granted the same day. It was the first licensing of the respondent under the 1955 Act and was in the following terms: "This licence.... is hereby "renewed so as to be in force for twelve months ending 27th June, "1958, inclusive and licences the holder to drive any class of vehicle "which it licensed him to drive under the Motor Vehicles (Traffic and "Regulation) Act (Northern Ireland), 1926."

The respondent does not seem to have taken, or to have been called upon to take, any driving test as provided for by the 1955 Act, and when his licence was renewed on July 8, 1957, it must have been on the basis that his application to be again licensed came under section 13(1) (d) (ii) of that Act. The terms of this last renewal were obviously framed with that provision in mind and the fact that they refer to "any class of vehicle" instead of any "class or description" of vehicle —the expression used in paragraph (d) (ii)—cannot, in my opinion, affect the validity of the renewal. Whatever the exact distinction between "class" and "description" may be, the paragraph used these words disjunctively and it is enough if it is satisfied as respects one of them. As we have seen, the expression "class or description" also

occurs in sections 12(1) and 15 of the Act of 1955 and I think it must have the same meaning in all these sections, with the word "class" signifying one or other of the classes specified in section 3(1) of that Act. No doubt one may have a vehicle of a "description" which falls inside, yet without exhausting, one of these classes. For example, motor tractors as defined in section 3(1) (c) are undoubtedly a class of motor vehicle, while the exception mentioned in section 18(3)—"an "agricultural tractor under two tons and a half weight unladen"—would seem to be a description of motor vehicle. But one of the features of the Act of 1955 was its new classification of motor vehicles and I can see nothing in sections 12, 13 or 15 to justify the view that "class" is used therein with reference to any classification other than that provided by section 3. If this is so, the terms of the last renewal must, I think, be read as using this word in the same sense.

The question, then, is what those terms authorised. The appellant says they incorporated the restriction contained in the original licence and therefore did not authorise the driving of the motor lorry concerned in the case because it was more than 2½ tons in weight unladen. The respondent, on the other hand, contends that the type of vehicle which he was originally licensed to drive would now correspond with the class of motor cars mentioned in section 3(1) (e), and that his last renewal, granted as it was after the Act of 1955 came into force, accordingly licensed him to drive a vehicle of that class and therefore of any weight unladen not exceeding 3 tons.

The issue thus joined is in some respects a confusing one, for the transitional powers conferred by section 76(2) of the Act of 1955 do not appear to have been used so as to clarify the position under renewals such as that with which we are now dealing. But on two matters, at any rate, there can be little controversy. In the first place, it seems quite clear that if the respondent had been of age when he first applied for a motor car licence under the Act of 1926, the terms of the last renewal would, at least, have authorised him to drive any motor vehicle within the class of motor cars as defined by section 3(1) (e). No restriction by reference to an unladen weight of less than 3 tons would have been applicable at any time, and the licence to drive under the Act of 1926 would, in its effect, have been a licence to drive the class of motor cars defined as aforesaid by the Act of 1955. And, secondly, there can, in my view, be no doubt that the restriction contained in the respondent's original licence was authorised, and authorised only, by the now repealed provisions of section 3(5) of the Act of 1926. Under the Act of 1955, as under the earlier Act, the

licensing authorities must respect and give effect to any disqualification imposed by law, but they have no power themselves to impose a disqualification on the ground of age in the exercise of their discretion.

If, as I would hold, these views are well founded, the question for decision narrows to whether or not the terms of the last renewal caused the original restriction to persist. In my opinion they did not do so. The fact that the last renewal authorised the driving of a *class* of vehicle—which must be the class defined by section 3(1) (e) of the Act of 1955—instead of authorising the driving of a particular description of vehicle—which might have gone further to incorporate the restriction—seems to me to support this conclusion. But there are more cogent reasons. When the last renewal was granted the licensing authority was acting under the Act of 1955 and had no longer any power to impose the restriction which that Act had abolished. This may explain the use of the word "class" rather than "description"; and, however that may be, it certainly justifies the rejection of an interpretation which would incorporate the restriction as a matter of implication. Again, if the licensing authority had intended to maintain the restriction as a term of the licence, it was its duty, when it came to discharge its functions under the Act of 1955, to specify the restriction in the prescribed manner having regard to section 15(1) of that Act and regulation 21 of S. R. & O. 1956, No. 142. There has been no attempt to do that and the omission makes it a fair inference that there was no such intention.

On these grounds I am of the opinion that during the currency of the last renewal of his licence, that is to say, during the year ending June 27, 1958, the respondent was duly licensed to drive the motor lorry in question. For my part, I would therefore answer the question submitted at (a) in the case stated in the affirmative. From this it would follow, as was conceded at the hearing, that question (b) should be answered in the affirmative.

BLACK L.J.: This case raises a difficult question of construction of a provision contained in section 13(1) of the Road Traffic Act (Northern Ireland), 1955.

The defendant was prosecuted at Castlewellan Petty Sessions on two charges:

(1) of driving a motor lorry on a road on July 4, 1958, while not holding a driving licence entitling him to drive a vehicle of the class or description to which the vehicle belonged;

(2) of driving the lorry without there being in force a policy of insurance in respect of third party risks.

The defendant's driving licence had in fact expired on June 27, 1958, so that he had no driving licence in force on July 4, 1958, but we were informed that (presumably for reasons which are not difficult to conjecture) the prosecutor chose not to press the first of the above charges. As regards the other charge, the learned resident magistrate held that at the material time there was in force in relation to the driving of the lorry by the defendant a policy of insurance in respect of third party risks which complied with the requirements of the Road Traffic Acts, and accordingly he made orders dismissing both charges. The question which arises, therefore, is whether on July 4, 1958, there was in force a third party insurance covering the driving of the lorry by the defendant.

It appears that the owner of the lorry was one Francis Trainor and that on July 4, 1958, the defendant was employed by Francis Trainor and was driving the lorry on Francis Trainor's order or with his permission. On that date there was in force a policy of insurance in the name of Francis Trainor covering the driving of the lorry by the policy holder and any other person in the policy holder's employ and driving on his order or with his permission "provided the person so "driving holds a licence to drive the vehicle or has held and is not "disqualified from holding or obtaining such a licence." As the defendant's licence had expired before July 4, 1958 the question whether the policy was effective to cover the lorry while he was driving it depends on whether it can be said that he had held a licence entitling him to drive the vehicle.

The first licence entitling the defendant to drive a motor car (within the meaning of that phrase as used in the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926) was taken out by the defendant on June 28, 1955. As the defendant was then only 17 he was subject to the provisions of section 3(5) of the Act of 1926 which disqualified a person under the age of 21 years from obtaining a licence to drive a motor car which was within any of the descriptions set forth in paragraph 5 of the Second Schedule to the Finance Act, 1920, and which exceeded 2½ tons in weight unladen. The vehicles falling within the descriptions in this paragraph 5 were vehicles constructed for use and used only for the conveyance of goods in the course of trade. The licence issued to the defendant in June 1955 was accordingly what was called a Class (B) licence, licensing him for twelve months to drive (a) a motor cycle only, and (b) a motor car of

any class, including a motor cycle, but excluding a mechanically-propelled commercial goods vehicle exceeding 2½ tons unladen weight. During the next year this licence was renewed by the defendant so as to be in force for twelve months ending on June 27, 1957.

In the meantime the Road Traffic Act (Northern Ireland), 1955 was passed. By section 13(1) (d) of that Act it was provided that the licensing authority should on payment of the prescribed fee grant a driving licence to any person "(d) who satisfies the authority in the "prescribed manner that he has either (i) at some time passed or is "exempted from the prescribed test of competence.... to drive "motor vehicles of the class or description to which his application "relates; or (ii) at some time before the appointed day held a driving "licence under this Act or under section three of the Act of 1926 "authorising him to drive vehicles of the class or description which he "would be authorised by the driving licence applied for to drive."

By the Road Traffic Act (Northern Ireland), 1955 (Date of Commencement) (No. 4) Order (Northern Ireland), 1956 (S. R. & O. 1956, No. 144) it was directed that this section 13 of the Act of 1955 relating to driving licences should come into operation on October 1, 1956.

The defendant's first application for a renewal of his driving licence after the Act of 1955 had come into operation was dated July 8, 1957 and a licence purporting to be a renewal was granted to him to be in force for twelve months ending on June 27, 1958.

On July 4, 1958, the date in respect of which the charges were brought against the defendant, the unladen weight of the motor lorry which the defendant was driving was 2 tons 19 cwt. The defendant was then still under the age of 21. The defendant's contention is that section 3(1) of the Act of 1955 sets out certain classes of vehicles, one of which classes is "motor cars"; that this class "motor cars" would include the vehicle which he was driving on July 4, 1958; that he had held a licence authorising him to drive motor cars, and that accordingly by virtue of section 13(1) (d) (ii) of the Act of 1955 his new licence was not limited to the driving of vehicles not exceeding 2½ tons in weight unladen, but entitled him to drive that class of vehicles called "motor cars" which are defined in the Act of 1955 as vehicles the weight of which unladen does not exceed 3 tons. The prosecutor's contention on the other hand is that the scope of the defendant's driving licence was not extended by virtue of section 13(1) (d) (ii) of the Act of 1955 and that if a person under 21 in the defendant's position wished to have a licence entitling him to drive a commercial

goods vehicle of greater weight than 2½ tons unladen he would have to pass a driving test. The serious aspect of the case, of course, is that if the prosecutor's contention is correct the insurance company would have been entitled to repudiate liability if an accident had occurred involving injury to a third party while the defendant was driving a lorry exceeding 2½ tons in weight unladen.

As there is no suggestion that the defendant had passed or was exempted from a driving test this case turns entirely upon paragraph (d) (ii) of section 13(1) of the Act of 1955. I confess I find difficulty in apprehending what is meant by the first phrase in this paragraph "at some time before the appointed day held a driving licence under "this Act". I cannot see how a person could hold a driving licence under the Act of 1955 before the day appointed for the coming into operation of the provisions of that Act regarding the granting of driving licences. However this may be, the real question turns upon the following words of the paragraph. Did the defendant at any time before the appointed day hold a driving licence under section 3 of the Act of 1926 authorising him to drive vehicles of the class or description which he would be authorised by the driving licence applied for to drive? One asks what is the reason for using the phrase "class or "description". I think that the object of the phrase is to provide that if the applicant's previous licence had authorised him to drive vehicles of a certain class he could obtain a new licence to drive vehicles of that class, but that if his previous licence had been one authorising him to drive vehicles of a certain description he could obtain a new licence to drive vehicles of that description. In the present case the defendant had had a licence to drive vehicles of a certain description, namely motor cars which were not commercial goods vehicles and commercial goods vehicles not exceeding 2½ tons in weight unladen. Can it also be said that he had had a licence to drive vehicles of a certain class? The class suggested is the class described as motor cars in section 3(1) (e) of the Act of 1955, namely vehicles not exceeding 3 tons in weight unladen which is the same class of vehicles as that described as motor cars in the Act of 1926 adopting the description of the class from the definition of light locomotive in section 1 of the Locomotives on Highways Act, 1896 (see the Act of 1926, section 25(1)). I do not think that it can be said with accuracy that the defendant had had a licence authorising him to drive vehicles of this class. He had undoubtedly a licence to drive certain vehicles included in this class. But his licence did not authorise him to drive certain other vehicles included in this class, namely commercial goods vehicles exceeding 2½ tons in weight unladen.

This view as to the effect of section 13(1) (d) (ii) of the Act of 1955 appears to me to be borne out by the different scheme as to the scope and extent of licences in the Act of 1955 from that in the Act of 1926. The Act of 1955 appears to contemplate that licences may be issued authorising the licensee to drive vehicles only of certain classes or descriptions (see section 12(1)) and that licences may be made subject to conditions or restrictions (see section 14).

There was, however, no flexibility of this nature under the Act of 1926. That Act contemplated so far as I can see only three types of licence: (a) a general driving licence, (b) a licence limited to driving motor cycles obtainable by boys over the age of 15, and (c) a licence such as that held by the defendant limiting the description of commercial goods vehicles which he was authorised to drive to those not exceeding two and a half tons in weight unladen. When section 13(1) (d) (ii) of the Act of 1955 speaks of a licence under section 3 of the Act of 1926 authorising the holder to drive vehicles of the class or description etc., one assumes that the words "or description" were intended by the Legislature to have some meaning and effect different from that already given by the word "class". In construing a statute every word is prima facie to be regarded as intended to have some effect or to be of some use. See the authorities cited in the judgments delivered in this court in *Walshe v. Taggart*[1]. When one goes back to the three types of licences contemplated by section 3 of the Act of 1926 a general licence to drive motor cars is a licence to drive a *class* of vehicles, namely the class described in section 3(1) (e) of the Act of 1955, a licence to drive motor cycles is also a licence to drive a *class* of vehicles, namely the class described in section 3(1) (f) of that Act. And so when we come to the words "or description" in paragraph (ii) of section 13(1) (d) it seems to me that if these words are to be given any meaning or effect the only subject matter to which they can refer is vehicles of the description which a person holding a licence of the type held by the defendant was entitled to drive. Accordingly I am of opinion that the effect of the words "or description" in paragraph (ii) is to provide that a man who had held a driving licence of the type held by the defendant is only to be entitled to get a similarly limited licence, unless of course he passes the appropriate driving test for a wider licence.

For these reasons I am of opinion that both of the questions submitted in the case stated should be answered in the negative.

It is perhaps worthy of note, having regard to the words in section

[1] [1951] N.I. 1 at 7, 19.

13(1) (d) (ii) "which he would be authorised by the driving licence "applied for to drive", that the defendant's application of July 8, 1957, was simply for a renewal of his existing licence. Unfortunately the renewal issued to him in pursuance of that application was expressed to licence him to drive any *class* of vehicle which it licensed him to drive under the Act of 1926, whereas in my view the only licence which in the circumstances the licensing authority had power to issue to the defendant was a licence authorising him to drive any description of vehicle which he had been licensed to drive under that Act. Accordingly, notwithstanding the view which I have taken as to the legal position it seems to me that it would hardly be just to impute any real blame to the defendant in regard to the insurance point, and if the case goes back to the resident magistrate I trust he will have regard to this view when considering what penalty he should impose.

CURRAN L.J.: The defendant and respondent on July 8, 1957, applied for a renewal of the licence he held under section 3 of the Act of 1926. This licence authorised him to drive a motor car of any class, but expressly excluded a goods vehicle exceeding 2½ tons unladen. The renewal was granted, and expressly licensed the applicant to drive "any class of vehicle which it licensed him to drive" under the 1926 Act.

In my opinion one can only ascertain what vehicle or vehicles the applicant was licensed to drive under the 1926 Act by referring to the terms of the licence granted under that Act. Such a reference discloses that goods vehicles exceeding 2½ tons unladen were excluded. It is that licence, with that express exclusion on it, that the applicant sought to renew; and, in my opinion, it was that licence, with that exclusion on it, that the licensing authority purported to renew. I apprehend that it was for this reason that no driving test was required under section 13(1) (d) of the Act of 1955, that is to say, because "at some time before the appointed day" (the applicant) "held a driving licence under ....section three of the Act of 1926 "authorising him to drive vehicles of the class or description which he "would be authorised by the driving licence *applied for* to drive". Note the words "by the driving licence applied for".

As I have pointed out, the driving licence *applied for* was to drive a motor car of any class, but excluding goods vehicles exceeding 2½ tons unladen. No doubt the licensing authority cannot *impose* such a restriction on an applicant for a licence under the Act of 1955. But I have not found any provision of that Act which prevents the licensing authority granting a restricted licence if that is what is applied for.

Had the applicant applied for an unrestricted licence to drive a motor car, including goods vehicles exceeding 2½ tons unladen, the provisions of section 13(1) (d) (ii) of the Act of 1955 in my opinion would not have applied, and the applicant would have had to satisfy the authority under section 13(1) (d) (i) of the Act of 1955 that at some time he had passed or was exempt from the prescribed test of competence.

If I am wrong in my opinion that the licensing authority can grant a restricted licence if requested to do so, then the applicant's present licence may be ineffective either because it contains such a restriction; or, if it be contended that it must be treated as if it contained no such restriction, then because the licence was granted without the applicant satisfying the licensing authority that he had passed or was exempt from the prescribed test of competence. I am afraid I can see no way out for the applicant. He was not, in my opinion, licensed to drive a vehicle of 2 tons 19 cwt. unladen.

I would, therefore, answer each of the questions submitted at (a) and (b) in the case stated in the negative.

Appeal allowed.
Case remitted.

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitors for the respondent: *McGarvey, Lynch & O'Neill.*
Solicitor for the licensing authority: *John A. Young.*

J.P.

RAINEY v. NORTH DOWN RURAL DISTRICT COUNCIL[1]

Compulsory acquisition of land—Compensation—Works not constructed on lands acquired from claimant—Whether compensation payable for depreciation of claimant's farm due to proximity of sewage disposal works and discharge of effluent into stream—Injurious affection—Local Government Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 22 (1); *Sch.* 2 *art.* 10(1).

Lands belonging partly to the claimant and partly to an adjoining owner were acquired by a local authority for the purpose of constructing a sewage disposal works. The lands acquired from the claimant constituted only a small portion of her holding and the actual physical structure of the sewage works was situate entirely on the lands acquired from the adjoining owner. Non-deleterious effluent was discharged into a stream in respect of which the claimant was a riparian owner.

The claimant claimed compensation in respect of the depreciation in the value of the lands she retained due to the proximity of the sewage disposal works and the discharge of effluent into the stream.

Held, that no compensation was payable because, (i) the user in respect of which the claim was made did not take place on lands acquired from the claimant, and (ii) the discharge of non-deleterious effluent into the stream by the local authority was the exercise of their normal riparian right and this did not in any way depend upon the acquisition of any part of the claimant's lands.

CASE STATED by an official arbitrator under section 6 of the Acquisition of Land (Assessment of Compensation) Act, 1919.

By means of a vesting order made by the Ministry of Health and Local Government, certain farm lands belonging to two adjoining owners were acquired by a local authority for the purpose of erecting a sewage disposal works. The greater part of the lands acquired lay within the holding of a Mr. Graham, but a small strip of the claimant's lands, measuring some 3 square perches, together with a length of a watercourse which separated her farm from that of Mr. Graham, was also taken. The dividing line between the two holdings was the middle line of the watercourse. The latter was a natural stream about 11 feet in width and it formed the boundary of the claimant's farm for some distance downstream of the lands in question.

The sewage disposal works, so far as their actual physical structure was concerned, were erected entirely upon the lands which had been acquired from Mr. Graham, and the effluent from the works was carried by pipes into the stream at the point where it flowed between the lands acquired from Mr. Graham and the small plot acquired from the claimant. These pipes projected from the bank on Mr.

[1] In the Queen's Bench Division before Lord MacDermott L.C.J. and Curran L.J.: Mar. 23, 24, May 1, 1959.

Graham's side, but did not reach as far as the centre line of the stream. It was accepted by counsel for both parties that the effluent would mingle with the waters of the stream throughout its width.

The claimant sought compensation in respect of the depreciation in the value of her farm due to (a) the proximity of the sewage disposal works, and (b) the discharge of effluent into the stream. The arbitrator found as a fact that depreciation had taken place and awarded £600 compensation in respect of (a) and £250 in respect of (b). There was no evidence before him, nor did he find, that the effluent was deleterious or caused a nuisance.

On the request of counsel for the local authority the arbitrator stated his award in the form of a special case for the decision of the court on whether he was correct in law in awarding compensation under these two heads.

Gibson Q.C. and *McQuitty* for the local authority. The vesting order was made under section 22 (1)(b) of the Local Government Act (Northern Ireland), 1934, and the question of compensation was referred to the arbitrator in accordance with article 10(1) of the Second Schedule to that Act which contains the phrase "land "injuriously affected". The rules governing assessment of compensation by an arbitrator are to be found in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Rule 2 provides that "the value of land shall, subject as hereinafter provided, be "taken to be the amount which the land if sold in the open market by "a willing seller might be expected to realise". Rule 6 states that rule 2 "shall not affect the assessment of compensation for dis- "turbance or any other matter not directly based on the value of "land". That rule does not confer any new right to compensation for injurious affection, but merely preserves rights under the existing law: *Horn v. Sunderland Corporation*[1] per Greene M.R. The position, therefore, is that in order to find any right to compensation for injurious affection it is necessary to look to the law as it stood prior to the 1919 Act. If the claimant is entitled to compensation at all she must bring herself within the decisions on section 63 of the Land Clauses Consolidation Act, 1845. Under that section there are three classes of case where injurious affection can arise from the construction of works:—

Class 1. Where the works are executed on land which does not belong to the claimant and no part of claimant's land is taken. In cases within this category compensation is payable only if the

[1] [1941] 2 K.B. 26, 33.

authority does something which would have been actionable at law. No claim lies for injurious affection by user as distinct from execution of the works.

Class 2. Where part of claimant's land is taken and part is left, and where the works are executed on that part of claimant's land which has been taken. In cases coming within this category all damage that can be reasonably foreseen shall be taken into account in assessing compensation for severance and injurious affection.

Class 3. (a) Where part of claimant's land is taken but the works are executed on other land. This is the category within which the present case falls.

Class 3. (b) Where claimant's land is taken and the works are executed partly on land which is taken from claimant and partly on land which is taken from another owner.

It is important to keep these different categories in mind when considering the effect of the authorities and for the purpose of differentiating between the various methods of assessing compensation. It is clear from the authorities that in the circumstances of the present case no claim lies in respect of user: *Hammersmith Rly. Co. Ltd. v. Brand*[1]; *Sisters of Charity of Rockingham v. R.*[2]; *City of Glasgow Union Rly. Co. v. Hunter*[3]; *R. v. Mountford*[4]; *London & North-Western Rly. Co. v. Reddaway*[5]; *Horton v. Colwyn Bay & Colwyn U.D.C.*[6]. There is no claim for "injurious affection" where no works are constructed on lands acquired from the claimant.

Stewart Q.C. and *Little* for the claimant. The claimant is the owner of a Grade A dairy herd and the stream is used for watering the cattle. As a riparian owner she is entitled to have the stream flow past her lands in its natural state of purity. "By pollution is meant the doing "of something which changes the natural qualities of the water": Halsbury's Laws of England, 2nd ed. vol. 33, p. 606; *Young (John) & Co. v. Bankier Distillery Co.*[7].

[LORD MACDERMOTT L.C.J. There is not a scrap of evidence that the effluent changes the natural quality of the stream. Surely the arbitrator's award was on the basis that there was a diminution in the value of the claimant's farm due to the fact that the effluent, whether impure or not, was being discharged into the stream?]

The stream, which forms part of the lands taken from the claimant, is being used for an essential part of the sewage disposal works.

1 (1868) L.R. 4 H.L. 171.
2 [1922] 2 A.C. 315.
3 (1870) L.R. 2 Sc. & Div. 78.
4 [1906] 2 K.B. 814.
5 (1907) 23 T.L.R. 279.
6 [1908] 1 K.B. 327.
7 [1893] A.C. 691.

Provision for the discharge of effluent is so essential to the "execution "of the works" that it cannot be said that no part of the works are executed on lands taken from the claimant. The circumstances are such as to bring the claim within the principle of the decisions in *R. v. Mountford*[1] and *Sisters of Charity of Rockingham v. R.*[2].

There is an important distinction between cases where the acts complained of cause mere personal inconvenience, and those in which there is actual injury to the land: *Chamberlain v. West End of London & Crystal Palace Rly.*[3]. It is also important to have regard to the wording of the relevant legislation in considering the authorities. Luxmoore J. in *In re Simeon & Isle of Wight R.D.C.*[4] took the view that the words "execution of the works" in section 68 of the Lands Clauses Consolidation Act, 1845, are wider than "construction of "the works", the phrase used in the Railway Clauses Act, 1845, and that they "include the exercise, that is the carrying out and the "execution of the appropriate statutory powers". See also *Fletcher v. Birkenhead Corporation*[5]. It is submitted that the words "injuriously "affecting other lands by the exercise of the powers" in section 63 are wider still. In the present case land of the claimant was in fact taken in connection with the execution of the works complained of. The rule that compensation can only be given for that which, unless sanctioned by statute would otherwise have been an actionable wrong, has no application to cases where the act complained of was done on land which had been taken from the claimant: *In re Stockport, Timperley & Altringham Rly. Co.*[6]. The fact that the area of land taken was very small does not affect the application of the principle: *Wright v. President of the Air Council*[7] per Talbot J.

Cur. adv. vult.

Lord MacDermott L.C.J. stated the facts and continued: The claimant sought compensation in respect of the depreciation in value of her farm due to, (a) the proximity of the sewage disposal works; and (b) the discharge of the effluent from the sewage disposal works. The arbitrator must have found both of these allegations of depreciation proved for he has measured £600 as the compensation in respect of (a) and £250 as the compensation in respect of (b). These sums, it may be as well to note, do not postulate or assume any actionable interference with the claimant's proprietary rights. As I understand

1 [1906] 2 K.B. 814.
2 [1922] 2 A.C. 315.
3 (1863) 32 L.J. Q.B. 173.
4 [1937] Ch. 525, 539.
5 [1907] 1 K.B. 205.
6 (1864) 33 L.J. Q.B. 251.
7 (1929) 143 L.T. 43, 45.

the award, they merely recognise that the proximity of the sewage works and the discharge of the effluent, no matter how innocuous in fact, have each depressed the market value of the claimant's farm.

The Council, however, contended that it was under no liability to pay compensation in respect of these two heads of claim, and the arbitrator, accordingly, stated the following questions for the decision of this court:— "(a) Would I be correct in law in awarding "compensation in respect of depreciation in the value of the claim- "ant's farm of land with dwelling house and outbuildings thereon due "to the proximity of sewage disposal works on the other land in "which the claimant had no interest?

"(b) Would I be correct in law in awarding compensation in "respect of depreciation in the value of the claimant's farm of land "with dwelling house and outbuildings thereon due to the normal "discharge of effluent from sewage disposal works into a stream in "respect of which the claimant was a riparian owner?"

Whether claims for depreciation in cases of this kind should be thus split is a matter on which I need now express no opinion. On the conclusions I have reached, the issue of liability is not affected by this splitting, and the parties have accepted it and have agreed the questions submitted. I therefore propose to deal with the claims as they have been made, but without prejudice to any question which may hereafter arise as to whether, or how far, claims of this nature are really severable.

The Council constructed these sewage works under the powers conferred by section 30 of the Public Health (Ireland) Act, 1878. Two other sections of the Act of 1878 may be mentioned in passing. The discharge of effluent into a natural watercourse is not forbidden, but, by section 19, it must be ".... freed from all excrementitious or other "foul or noxious matter such as would affect or deteriorate the purity "and quality of the water in such stream or watercourse....". As already indicated, there is nothing in the facts of the present case to suggest a breach of this provision. Then, by section 274 it is enacted that "Where any person sustains any damage by reason of the exercise "of any of the powers of this Act, in relation to any matter as to which "he is not himself in default, full compensation shall be made to such "person by the sanitary authority exercising such powers; and any "dispute as to the fact of damage or amount of compensation shall be "settled by arbitration....". This provision is expressed in wide terms, but the claimant cannot found upon it as the authorities make it clear that the damage to which it refers must be such as would be

actionable but for the enabling statute: see *Ricket v. Metropolitan Rly. Co.*[1], and *Burgess v. Northwich Local Board*[2], a case under the corresponding English enactment—section 308 of the Public Health Act, 1875—in which Lindley J. (as he then was) says: ". . . . It is now "a well-settled principle that a person is not entitled to compensation "for damage done to him by a public authority acting under the "powers of an Act of Parliament, unless he could have maintained an "action for such damage if the statute had not authorized the acts "causing the damage."

The arbitration was subject to the rules contained in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Of these rule (2) deals with the determination of the value of the land acquired, and rule (6) says: "The provisions of Rule (2) shall not "affect the assessment of compensation for disturbance or any other "matter not directly based on the value of land." This provision, however, does not confer any new compensatory rights upon the claimant: see *Venables v. Department of Agriculture for Scotland*[3] per Lord Alness, and *Horn v. Sunderland Corporation*[4] per Scott L.J. Apart from the value of the lands taken (as to which no question arises for our consideration), what, then, are the claimant's statutory rights to compensation? Section 203 of the Act of 1878 incorporated the Lands Clauses Acts, but, in so far as it related to the taking of lands otherwise than by agreement, that section has been repealed by section 22(3) of the Local Government Act (Northern Ireland), 1934. Under section 22(1) of that Act, however, the Council was empowered, for the purposes of the Act of 1878, to seek an order from the Ministry of Home Affairs (now the Ministry of Health and Local Government) vesting the lands to be acquired in accordance with and subject to the provisions of the Second Schedule of the Act of 1934. That procedure has been followed here and I therefore turn to this Schedule. Article 10(1) thereof refers to an official arbitrator any question of disputed compensation arising between the local authority and ". . . . any person interested in any land to which the vesting order "relates, or land injuriously affected by the works proposed to be "carried out. . . .". The Schedule contains little else that is material as respects the nature and extent of the compensation that may be awarded, and it certainly does not purport to codify the law on that subject or to define the phrase, so much in point in these proceedings, "land injuriously affected". In these circumstances the inference is, I think, overwhelming that this phrase is thus used in the sense that

[1] (1867) L.R. 2 H.L. 175.
[2] (1880) 6 Q.B.D. 264, 274.
[3] 1932 S.C. 573, 579.
[4] [1941] 2 K.B. 26, 41.

it has long borne in the law relating to compensation for the acquisition of land for public purposes and, in particular, to the interpretation of certain provisions of the Lands Clauses Acts. This was not disputed before us, nor was it in question that the enactments most in point in this connection were sections 63 and 68 of the Lands Clauses Consolidation Act, 1845. Of these section 63 provides that "In estimating the.... compensation to be paid.... regard shall be "had by the.... arbitrators.... not only to the value of the land to "be.... taken.... but also to the damage, if any, to be sustained by "the owner of the lands by reason of the severing of the lands taken "from the other lands of such owner, or otherwise injuriously "affecting such other lands by the exercise of the powers of this or the "special Act....". Section 68, also much canvassed in the cases although seemingly of a procedural character, provided for the settlement of claims and began by saying: "If any party shall be "entitled to compensation in respect of any lands.... which shall "have been taken for or injuriously affected by the execution of the "works....". Section 68 was repealed by the Repeal of Unnecessary Laws Act (Northern Ireland), 1953, but I do not think this can be said to modify the effect of authorities on the subject of injurious affection or to diminish the value of section 68 as an exposition of the somewhat inelegantly phrased section 63.

In its natural meaning, and without regard to the requirements of a particular context, the expression "injuriously affected", with its grammatical variants, is one of wide import, and if the closely reasoned opinion of Lord Cairns in *Hammersmith Rly. Co. Ltd. v. Brand*[1] had carried the day, the claimant would be entitled to receive compensation as measured under the two heads now in dispute, for on the findings of the arbitrator her lands have, in fact, been injuriously affected by what the Council has done under its statutory powers.

In the *Hammersmith Railway* case[1], however, Lord Cairns was in the minority and statutory compensation for the injurious affection of lands under the Lands Clauses Consolidation Act and other similar codes was, in general, limited by the House of Lords to cases in which the acquiring authority had acquired other lands of the claiming owner. In the well-known Canadian appeal, *Sisters of Charity of Rockingham v. R.*[2] the question was again discussed. The claimants and appellants there had had a part of their lands acquired

[1] (1869) L.R. 4 H.L. 171, 215. [2] [1922] 2 A.C. 315.

and on this part, and on other lands, a railway shunting yard had been constructed. The Judicial Committee held that the claimants and appellants were entitled to compensation for injurious affection and Lord Parmoor, delivering the judgment of the Board, spoke of the principle in question in the following passage[1]: "If the railway "shunting yard, of which complaint has been made, had been con- "structed on land, no part of which had been expropriated from the "appellants, the appellants would not have been entitled to claim "compensation, although, in fact, such construction had seriously "depreciated the value of their property on the west side of the rail- "way. Where no land of the same owner has been taken, the words " 'injuriously affected' only include damage or loss which would have "been actionable but for statutory powers, and such damage or loss "must be occasioned by the construction of the authorised works, as "distinct from their user. These limitations were adopted in a series "of early English cases, and confirmed in the House of Lords in the "case of *Hammersmith Rly. Co. v. Brand*[2]. Lord Cairns dissented "from this interpretation of the statutory right to compensation, but "the decision in that case states the principle to be applied in English "law. It is authoritative, and cannot be altered without fresh legisla- "tion. If, therefore, the land taken for the shunting yard had belonged "wholly to some owner other than the appellants, the appellants "could not have claimed compensation on the ground that their "property on the east side of the railway had been 'injuriously " 'affected'; but part of the land so taken was the property of the "appellants, and it is on this ground that the appellants base their "claim to compensation."

No part of the damage or loss with which we are now concerned would have been actionable but for the Council's statutory powers, and it is beyond argument that if the lands taken had been confined to those of Mr. Graham, the claimant would have had no right to compensation. If, therefore, the claim in respect of the £600 awarded for depreciation of the claimant's farm on account of the proximity of the sewage disposal works on Mr. Graham's lands could be treated in isolation, the answer would clearly be that no part of this sum was payable as statutory compensation by the Council. The question which then arises is whether the acquisition by the Council of part of the claimant's lands, as already described, changes the situation so as to entitle her to compensation under that head of claim and under the other head relating to the discharge of effluent. It will be convenient to consider the latter claim first.

[1] [1922] 2 A.C. at 324. [2] (1869) L.R. 4 H.L. 171.

This claim sounds in user—the discharge of the effluent from the sewage works into the stream—and it was the Council's case that this user afforded no ground for compensation as it did not take place on the lands acquired from the claimant, but on those acquired from Mr. Graham on which the works in their entirety had been constructed. So far as the factual position is concerned, I am of opinion that this contention is well founded. The discharge pipes stop short of the claimant's half of the bed of the stream and I do not think it can be said that the spreading of the discharged effluent throughout the breadth of the stream is a user, in any relevant sense of the word, of what was acquired from the claimant. It is a consequence of the exercise of a riparian right and would have been no trespass even if the claimant had retained her ownership of her half of the stream bed. If I am right in this, the authorities also seem to be on the side of the Council, for the authorised user of lands other than those acquired from a claimant cannot, in general, found a claim for compensation for injurious affection: see *Cowper Essex v. Acton Local Board*[1] in which the earlier cases on the point are mentioned, per Lord Watson; and *R. v. Mountford*[2]. If the judgment of Phillimore J. in *London and North Western Rly. Co. v. Reddaway*[3] is to be regarded as marking an exception to this principle, I do not think the facts here can be said to fall within that decision which related to a somewhat unusual situation, as was pointed out by Lord Alverston C.J. in the Court of Appeal in *Horton v. Colwyn Bay and Colwyn U.D.C.*[4].

This claim in respect of the discharge of the effluent must, in my opinion, also fail on broader, though related, grounds. There is no such thing as injurious affection "in the air": to be the subject of statutory compensation it must be a consequence, in some way at least, of what the acquiring authority has done or may do under its statutory powers. So far as those powers relate to what was taken from Mr. Graham, the claimant, as we have seen, is not entitled to compensation, and so far as they relate to the claimant's property their exercise has not resulted, in any way that I can discern, in the damage or loss attributed to the effluent and measured by the arbitrator in the sum of £250. The right of the Council to discharge the effluent into the stream has not been challenged. It was, as I have said, a riparian right and did not depend on obtaining the ownership of the claimant's half of the bed and soil. As I see the position, the

1 (1889) 14 App. Cas. 153, 166.
2 [1906] 2 K.B. 814.
3 (1907) 23 T.L.R. 279.
4 [1908] 1 K.B. 327, 338-9.

Council could have done just what it has done and is doing without acquiring any part of the claimant's lands. It may be desirable and convenient that it should own both banks in the vicinity of the point of discharge, but that has not caused or increased the depreciation for which the claimant now seeks compensation. That depreciation would be the same if the claimant's holding had not been touched, for it is due entirely to the fact that the effluent (however wholesome) gets into the stream and must, wherever discharged, mingle with its waters in the natural course of events. If the claimant were entitled to compensation under this head it could only be on grounds which would be common to other riparian owners downstream of the discharge.

It seems to me that the other head of claim—that in respect of the proximity of the sewage disposal works—must fall with the claim I have just been discussing. Taken separately, it is defeated by the principle set up in the *Hammersmith Railway* case[1], and taken together with the claim in respect of the effluent it is subject to all its infirmities.

For these reasons I would answer both the questions submitted for the opinion of the court in the negative.

CURRAN L.J.: I agree that claimant is not entitled to compensation for depreciation in the value of her property, due to the proximity of the sewage disposal works or to the discharge of effluent from such works. As no works have been constructed on the land taken from claimant, a claim to compensation can only be established on the basis of depreciation arising from the apprehended legal user of such land, as part of the sewage disposal works. It has not been suggested that any such basis can be found in the present case.

Declaration accordingly.

Solicitor for the local authority: *J. W. Russell.*
Solicitors for the claimant: *Wm. Anderson & Burns.*

S.M.M.

[1] (1869) L.R. 4 H.L. 171.

MONTGOMERY v. LONEY[1]

Motor vehicle—In charge under the influence of drink—Vehicle in forecourt of filling station—Forecourt used only by persons having business with proprietor—Whether a "road or other public place"—Road Traffic Act (Northern Ireland), 1955 (4 & 5 Eliz. 2, c. 27), ss. 39, 75.

By section 39(1) of the Road Traffic Act (Northern Ireland), 1955, "Every "person who....is in charge of, a motor vehicle on any road or other public "place, while he is under the influence of drink.... to such an extent as to be "incapable of having proper control of the vehicle, shall be guilty of an "offence....". By section 75 of the same Act "road" is defined as including "a public road and any street, carriageway, highway or roadway to which "the public has access".

The respondent was charged with being in charge of a motor vehicle in a public place while under the influence of drink. The "public place" was designated in the summons as the forecourt of a filling station. The filling station was situate a few yards back from the edge of a public road and the forecourt consisted of two carriageways with a perpetually open entry and exit from and to the public road at each end of the carriageways. The owner of the filling station impliedly invited motorists to come on his premises to purchase petrol and other supplies, but excluded therefrom persons other than customers or those having business with him.

Held, by the Court of Appeal (Curran L.J. dissenting), (i) that the motorists who were impliedly invited on to the premises were a sufficiently substantial portion of the public to constitute "the public" for the purposes of the Act of 1955;

(ii) that since such motorists entered the premises with the express or implied permission of the owner they had "access" to it;

(iii) and that, accordingly, the forecourt of the filling station was "a road "or other public place" for the purposes of section 39(1) of the Act of 1955.

Semble that a defendant could properly be convicted on a summons alleging that he had been guilty of an offence against section 39(1) "in a "public place" where the offence was proved to have been committed "on a road".

CASE STATED by the Resident Magistrate sitting at Lisburn Petty Sessions.

The facts are set out in the judgment of Lord MacDermott L.C.J.

Nicholson Q.C. and *McConnell* for the complainant and appellant. The forecourt of this filling station is a place to which the public has access, and therefore a public place for the purposes of the Act. The facts found in the case stated show that the premises were open to the public, and that motorists and pedestrians going to the shop were accustomed to enter them, so that the dangers which the Legislature intended to guard against by section 39 of the Act were

[1] In the Court of Appeal before Lord MacDermott L.C.J., Black and Curran L.JJ.: Feb. 2, May 25, 1959.

present, and present to a much greater extent than would be the case in a private road or driveway. We submit that the decisions on the corresponding English legislation and on other statutes referring to places to which the public has access support the view for which we contend.

In *Elkins v. Cartlidge*[1], a parking enclosure at the rear of an inn was held to be a public place, for the purposes of the English Act, following *R. v. Collinson*[2], and in *Bugge v. Taylor*[3] it was held by a Divisional Court that the justices had been entitled to hold that the forecourt of a hotel was a "road" for the purposes of the Road Transport Lighting Act 1927, which, it may be noted, is narrower in scope than section 39 of the Act of 1955, for it applies only to "roads". That case was followed in *Thomas v. Dando*[4].

In the Scottish case of *Harrison v. Hill*[5] it was held that a roadway leading only to a farmhouse was a public road.

[CURRAN L.J. It was found there that the farmer permitted the public to use the road. Did the decision not turn on that fact?]

In this case, the layout of the premises was an open invitation to enter them, and it is found as a fact that people did enter to go to the pumps or to the shop.

[CURRAN L.J. It is also found that the only persons permitted to enter were persons having business with the owner].

In spite of that, we submit that the public were invited to come on to the premises, and therefore that the public had access to the premises.

The most recent English case is *Griffin v. Squires*[6] where the question was whether a car park over which there was a right of way was a "road". It was held that it was not, but that was because it was found as a fact that there was no public right of access to the place.

If it were necessary to do so, we would contend that the forecourt of the filling station in this case was a "road" within the meaning of the Act of 1955, for section 75 defines "road" as including a public road "and any street, carriageway, highway or roadway to which the "public has access". We submit that that phrase refers to access with the permission, express or implied, of the owner or occupier. [They

1 [1947] 1 All E.R. 829.
2 (1931) 23 Cr. App. R. 49.
3 [1941] 1 K.B. 198.
4 [1951] 2 K.B. 620.
5 1932 S.C. (J) 13.
6 [1958] 3 All E.R. 468.

referred also to *Glynn v. Simmonds*[1]; *Walshe v. Taggart*[2]; *Russell v. Thompson*[3] and *Sewell v. Taylor*[4].]

McDevitt for the defendant and respondent. I rely on the dictum of Lord Clyde in *Harrison v. Hill*[5] where he says: "I think that, when "the statute speaks of the public in this connexion what is meant is "the public generally, and not the special class of members of the "public who have occasion for business or social purposes to go to "the farmhouse or to any part of the farm itself". That indicates that persons who come on to premises for the purpose of doing business with an individual, such as the owner of the premises, do not enter the premises as members of the public. *Thomas v. Dando*[6] is also a strong case in my favour, for in that case the place was held not to be a road to which the public had access, although it was found as a fact that customers were accustomed to use it.

The court in *Griffin v. Squires*[7] considered the car park in relation to the right of way over it, and although it was used by a substantial number of people, it was held that it was not a road because it was being used for the specific purpose of going to the allotments or the bowling green.

In *Elkins v. Cartlidge*[8] there is no finding that it was only the customers of the inn who used the car park.

The Act of 1955 was passed after most of the cases cited, and the Legislature must be taken to have accepted the view taken in the English and Scottish courts when it adopted the language used in the earlier enactments. In any event, this Act, being penal is to be construed strictly, and in favour of the subject.

Nicholson Q.C. replied.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: At Lisburn Petty Sessions on September 5, 1957, the complainant and appellant charged the defendant and respondent with being in charge of a motor lorry, on June 28, 1957, while under the influence of drink contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955. The alleged offence occurred, according to the summons, "in a public place, to wit, in the "forecourt of Millar's Filling Station at Carnlougherin on the main "Lisburn-Moira Road....".

Section 39(1) of the Act of 1955, in so far as material, reads as follows: "Every person who.... is in charge of, a motor vehicle on

1 [1952] 2 All E.R. 47.
2 [1951] N.I. 1.
3 [1953] N.I. 51.
4 (1859) 7 C.B.N.S. 160.
5 1932 S.C. (J) at 16.
6 [1951] 2 K.B. 620.
7 [1958] 3 All E.R. 468.
8 [1947] 1 All E.R. 829.

"any road or other public place, while he is under the influence of "drink.... to such extent as to be incapable of having proper "control of the vehicle, shall be guilty of an offence...." So far as this appeal, which is by way of case stated, is concerned, the important part of this enactment consists of the words "any road or "other public place". By section 75 of the same statute "road" is defined as including "a public road and any street, carriageway, "highway or roadway to which the public has access".

On the occasion in question the defendant was standing close to his motor lorry, which was stopped at the filling station mentioned in the summons, receiving a supply of petrol from the station pumps. The station itself is thus described in the case: "Millar's Filling "Station consists of an island stand of petrol pumps situated some "five yards back from the edge of the public road with a carriageway "on both sides of the pumps one such carriageway being adjacent to "the public road and the other carriageway on the side of the pumps "remote from the public road. There is a perpetually open entry and "exit from and to the public road at each end of the carriageway. "There is a fence or wall dividing the carriageway or forecourt from "the public road extending between the entrances. There is a small "shop for selling petrol oils and small requirements of motor vehicles "at the centre of the back of the forecourt and remote from the "public road. The only commodity sold in this shop other than "motor vehicles' supplies is cigarettes for the convenience of motor-"ists and those members of the public who call for them. No sweets "are sold. There is no garage or motor repair shop connected with "the station. No other business save that of the normal petrol filling "station is carried on therein or connected therewith. Petrol is sold to "customers calling with cans in addition to the direct supply to "vehicles." The station is private property. It is owned by a Mr. Millar and the case finds that the only persons he permits on it are his customers and people having business with him. The carriageway on which the motor lorry was standing is that more remote from the public road which is the Lisburn-Moira road, a busy and important highway as we all know. This carriageway is some eight to ten yards from the highway. The lay-out of which it forms part follows what has become a common pattern for filling stations, at any rate on main roads. The pumps are not sited to deliver to vehicles on the highway. They are on an island within the station premises which is served by two carriageways, one on either side, and each of which leads from and rejoins the highway. Motorists wanting petrol draw off the highway and regain it, after being supplied, by the carriageway

which is convenient. The provision of two carriageways facilitates the service of vehicles proceeding along the highway in either direction.

Having heard argument as to whether the forecourt of the station—a term used apparently to describe or include the said carriageways—was a public place within the meaning of section 39(1), the resident magistrate held "as a fact that the said forecourt, where the said "vehicle was found was not a road or other public place within the "meaning of" that section. He accordingly dismissed the summons, but has stated for the opinion of this court the question whether he was right in so holding.

The resident magistrate gives no grounds for his decision other than as mentioned above, and his description of the station is somewhat meagre. I read the case, however, as intended to indicate that the premises have the usual features of a "normal petrol filling "station" and I do not think a remit is necessary for the purpose of finding further facts. Reading the case as I do, I shall assume that the pumps of this station are so placed and labelled that they proclaim their purpose to passing traffic and constitute a standing invitation to motorists and others who want petrol to come in by the carriageways and buy it.

It is clear that these carriageways have not been dedicated to the public use and are not highways in the sense that the public have an absolute right of passage over them. They are private property and Mr. Millar is entitled to exclude from them any whom he does not want to admit. But that does not settle the matter. Is the carriageway on which the defendant and his lorry were found "a carriageway.... "to which the public has access"? Or is it an "other public place"? If the answer to either of these questions is in the affirmative section 39(1) will apply and the ruling of the resident magistrate will be wrong.

The difficulties raised by the first of these questions centre round the scope and import of the words "public" and "access" and have not, as yet, been entirely resolved by the decisions of the courts. These I must come to in due course, but it will be convenient, in the first place, to see what guidance is to be found in the terms and purpose of the Act of 1955.

The definition of "road" which I have already quoted serves various provisions of that Act. Thus, section 5 prohibits the use of motor vehicles not complying with the regulations as to construction etc. "on any road"; section 12 prohibits the driving of a motor vehicle "on a road" without a licence; section 18 prohibits the driving of certain classes or descriptions of motor vehicle by young

persons "on a road"; section 23 imposes a speed limit on roads which are "restricted roads"; section 32 provides that reflectors are to be carried by vehicles at night "on any road"; section 38 deals with the offence of driving dangerously "on a road"; section 39, as we have seen, makes driving or being in charge while under the influence of drink or drugs "on any road or other public place" an offence; section 42 makes careless driving "on a road" an offence; section 43 makes it an offence to exceed the speed limit when driving a motor vehicle "on a road"; section 47 makes it an offence for any pedestrian or pedal cyclist by his own negligence "on a road" to endanger his own safety or that of any other person; section 49 makes it an offence for any person "on any road" to cause or permit any vehicle to stand or remain in such a position as to cause or be likely to cause an obstruction; section 64 provides for the preparation of a code for the guidance of persons "using roads"; and section 65 empowers certain local authorities and the Ministry of Home Affairs to incur expenditure for the purposes of promoting safety "on roads".

There can be little doubt that the main object which Parliament had in mind in enacting these provisions was the protection of members of the community from the dangers of road traffic and, in particular, from those caused by motor vehicles. That has to be borne in mind in construing "public" and "access", for these words have no fixed and inflexible meaning and their true signification must depend on their context and the purpose for which they are used. Different codes may call for different interpretations: see for example, *O'Connor v. Synott*[1], where Palles C.B., holding that a circus tent was not a "public place" within the meaning of section 12 of the Licensing Act, 1872, refused to regard decisions under other enactments, including the Gaming Acts and Vagrancy Acts, as in point.

The general purpose of the relevant provisions of the Act of 1955, and the way in which "road" is made to include not only a public road but a road to which the public has access, show that Parliament did not intend to limit the protection it was providing to highways or places where members of the public are entitled to be as of right, and that it recognised that the risks to be guarded against can also arise in places to which the drivers of vehicles and others resort without such entitlement. On the other hand, the Act of 1955 contains nothing to indicate that the Legislature intended to make provision against the risks of vehicular traffic in every place and in all the circumstances in which those risks might conceivably occur. The protection

[1] (1902) 36 I.L.T.R. 239.

afforded is the protection of the public—whatever the exact meaning of the word may be—and there is no attempt that I can discern to extend the offences created to acts or omissions on private property from which the public is excluded in the sense that those who enter do so as trespassers. This does not mean that there can be no perils from the driving of vehicles on private property. But it does mean, I think, that Parliament realised the practical difficulties of supervision and enforcement on private property and was reluctant to go further than was necessary in the public interest.

These considerations seem to me to suggest that the word "access" as used in the definition connotes access with permission, if not as of right, and does not connote either the mere absence of any physical obstruction to entry, or the entry which constitutes a trespass.

But if this is so, what does the word "public" comprehend? What of carriageways or roads to which members of the public have access by permission? Here, the possibilities range very widely. There is, for instance, the private carriageway or road leading to some place of historical interest which the public is permitted to use freely; and, at the other end of the scale, there is the private carriageway or drive which only tradesmen and friends and relations of the owner or occupier are permitted to use. The first of these carriageways seems clearly a road to which the public has access. But if the same can be said of the second, the operation of the Act will invade private property to a substantial extent, since few can live in isolation and without those social and business contacts which inevitably mean that the use of most private carriageways cannot be restricted entirely to their owners or occupiers. I do not think it would occur to anyone reading the Act of 1955 that it was intended to regulate driving on carriageways in this second category. The invitees and licensees who use such carriageways are, it is true, members of the public. But permission to enter is not given to them as such, but because there is some reason personal to them for their admittance. They may come as guests or to deliver the mail or to read the meters: whatever their particular purpose, they form a class which is distinct from that composed of those who are invited or permitted to enter as members of the public. The terms of the Act seem to me to suggest that "public" may comprehend the latter of these classes, but not the former. While the distinction between them can be stated simply, in practice it may not always be easy to draw, as the invitation or permission, or the conduct from which the same is implied, may take varying forms and be due to very different motives, ranging from what is entirely commercial to what is purely altruistic. I do not find it possible to lay

down a test which will settle every case, but, in general, I think it may be said that if the invitation or permission is given to members of the public as such, the underlying motive will not be material.

On the other hand, it is obvious that the protection afforded by the Act would be curtailed appreciably and to an important degree if "public" has to be construed always as the public at large and without any sort of limitation or qualification. Take the case of the private road leading to a place of historical interest but with permission to enter granted only to members of the public travelling on foot. I find it hard to see any sound ground for thinking that the motorist who drives dangerously or carelessly along such a road would not be committing an offence under the Act as well as trespassing. Or, take the converse case of a road open to all motorists from which pedestrians are excluded. Again, it is hard to see anything in the language or policy of the Act to justify the view that the "public" has not access because access is limited to the motoring public. And I would be inclined to think that a moderate charge for the use of the road would make no difference in this respect. An exorbitant charge might, of course, mean the exclusion of the public; but a charge which does not have this result does not seem necessarily inconsistent with the public having access by permission. No doubt the "public" may be so qualified and fined down by stipulation as to cease to be the public in any real sense; but the dominant purpose of the relevant parts of the Act of 1955 is the protection of the public and there seems no reason to suppose why, in this setting, that elusive word should not include, in addition to the public at large, any substantial section thereof, such as motorists or pedestrians.

So far, then, my tentative conclusions would be that, in the expression "to which the public has access", the word "public" means those members of the general public or of a substantial section thereof who are accorded access as such rather than for any personal reason, and the word "access" means access by permission, either express or implied, if not as of right.

The words "or other public place" must, I think, be construed with special reference to the definition of the preceding word "road". If "road" is not limited to what can be used by the public as of right, it is but reasonable to assume that "public place" is not so limited either, and includes places to which the public has access in the sense already mentioned. But the statute says "....road or other public "place" and the insertion of the word "other" makes it plain that what is a "road" within the meaning of section 39(1) cannot also be within the expression "other public place". The same word, however,

implies that a "road" is a "public place" as these terms are used in the subsection.

I turn now to the authorities which it will be convenient to cite chronologically.

In *R. v. Collinson*[1] the Court of Criminal Appeal in England had to consider an appeal from a conviction at Assizes for driving a motor car under the influence of drink, and the point in issue was whether the alleged offence took place on "a road or other public place" within the meaning of section 15(1) of the English Road Traffic Act, 1930. The locus was a field at a point-to-point meeting to which pedestrians were admitted free and cars at a charge of 2/6d. per wheel. The appeal failed and Lord Hewart in delivering the judgment of the court said[2]: "It was ordinarily an open field, but at the point to point "race meeting pedestrians entered by the gate and paid nothing, and "there is evidence that a crowd of about 2,000 were there. Attention "was drawn to various cases and statutes, but cases must be read and "statutes must be construed with regard to the evils that they are "expected to avert. It was open to the learned judge to decide as a "matter of law that this was a public place within the meaning of the "section."

I come next to what is perhaps the most important of all the decisions on the subject—*Harrison v. Hill*[3]. In that case the driver of a motor lorry had been convicted under section 7(4) of the Road Traffic Act, 1930, on the ground that while disqualified from holding a driving licence he had driven his vehicle on a road which formed the access from a public highway to a farm. Section 121(1) of the Act of 1930 defines "road" as "any highway and any other road to which the "public has access....", and the question raised before the High Court of Justiciary was whether the road concerned fell within that definition. The court (Lord Clyde, Lord Sands and Lord Blackburn) sustained the conviction, holding that the road was a road to which the public had access. After pointing out that it is plain from the terms of the definition that the class of road intended is wider than the class of public roads to which the public has access as of right, Lord Clyde continued as follows[4]: "I think that, when the statute "speaks of 'the public' in this connexion, what is meant is the public "generally, and not the special class of members of the public who "have occasion for business or social purposes to go to the farm-"house or to any part of the farm itself; were it otherwise, the

1 (1931) 23 Cr. App. R. 49.
2 Ibid. 50.
3 1932 S.C. (J) 13.
4 Ibid. 16.

"definition might just as well have included all private roads as well "as all public highways.

"I think also that, when the statute speaks of the public having " 'access' to the road, what is meant is neither (at one extreme) that "the public has a positive right of its own to access, nor (at the other "extreme) that there exists no physical obstruction, of greater or less "impenetrability, against physical access by the public; but that the "public actually and legally enjoys access to it. It is, I think, a certain "state of use or possession that is pointed to. There must be, as a "matter of fact, walking or driving by the public on the road, and "such walking or driving must be lawfully performed—that is to say, "must be permitted or allowed, either expressly or implicitly, by the "person or persons to whom the road belongs. I include in permission "or allowance the state of matters known in right of way cases as the "tolerance of a proprietor. The statute cannot be supposed to have "intended by public 'access' such unlawful access as may be had by "members of the public who trespass on the property of either "individuals or corporations." The other members of the court expressed themselves rather differently on the point. Lord Sands, after stating that the object of the legislation was the protection of the public, said[1]: "In my view, access means, not right of access, but "ingress in fact without any physical hindrance and without any "wilful intrusion." And later, "In my view, any road may be re- "garded as a road to which the public have access upon which "members of the public are to be found who have not obtained "access either by overcoming a physical obstruction or in defiance of "prohibition express or implied." Lord Blackburn, apparently, was prepared to go further than the other members of the court; for after pointing out that the definition applied to all roads whether public or private to which the public had access he added[2]: ". . . . it appears to "me that any driver of a motor car whose licence had been withdrawn "would contravene the Act if he entered upon a private avenue and "drove a car thereon without the express permission of the owner of "the avenue." Now in that case the evidence was to the effect that the road in question led only to the farmhouse and was part of the farm, that it was maintained by the farm tenant, that it was used by those who wanted to get to the farm and that members of the public, not having business at the farm, frequently walked on the road; and it is clear that the court arrived at its conclusion, not because members of the public used the road in order to call at the farmhouse, but because

[1] 1932 S.C. (J) 17. [2] Ibid. 18.

the public, as such, was allowed to use the road for walking upon. It will be observed that Lord Clyde said that "the public" meant the public generally, but the facts did not require him to distinguish between the public and a substantial section thereof and I do not read his judgment as necessarily opposed to what I have already said on that aspect of the matter.

In *Bugge v. Taylor*[1], the question which came before a Divisional Court (Lord Caldecote C.J., Hawke and Humphreys JJ.) was whether the appellant had committed an offence by leaving his motor car during the hours of darkness unlighted on the forecourt of a hotel contrary to section 1(1) of the Road Transport Lighting Act, 1927, which required "every vehicle on any road" to carry lights during the hours of darkness, the expression "road" being defined by section 15 of the same Act as meaning "any public highway and any other road "to which the public has access". The forecourt of the hotel was bounded on one side by a public pavement and was open to the highway at both ends. Lord Caldecote C.J., giving the judgment of the Court, quoted from Lord Clyde's opinion in *Harrison v. Hill*[2] and held that the justices had plenty of material on which they could come to the conclusion that the forecourt was a "road to which the "public had access".

In *Elkins v. Cartlidge*[3] a Divisional Court (Lord Goddard C.J., Atkinson and Oliver JJ.) had to deal with a case in which the justices had dismissed an information charging the respondent with being under the influence of drink when in charge of a vehicle in a public place. The facts are not very fully reported but it appears that the justices found that the respondent had put his car, while under the influence of drink, in an enclosure at the rear of an inn which was reached through an open gateway from a well defined parking ground at the side of the inn and was held by the court to be part of a car park to which the licensee of the inn invited people to go and park. The charge was preferred under section 15(1) of the Act of 1930 and Lord Goddard, delivering the opinion of the Court, said[4]: "The section refers to 'a road or other public place'. I emphasise the "word 'other'. 'Road' is defined in s. 121 of the Act, and one must "have regard to that definition when considering the meaning of the "word 'public place', because the two things are treated *ejusdem* "*generis*. 'Road' means 'any highway and any other road to which the " 'public has access', and so includes every road over which the "public passes. Having regard to the definition of 'road', 'public

1 [1941] 1 K.B. 198.
2 1932 S.C. (J). 13.
3 [1947] 1 All E.R. 829.
4 Ibid.

" 'place' for the purposes of this section must be read as meaning a "place to which the public have access, i.e., have access in fact."

In *Thomas v. Dando*[1] a Divisional Court (Lord Goddard C.J., Oliver and Cassels JJ.) had again to consider a charge preferred under section 1(1) of the Road Transport Lighting Act, 1927. The defendant owned a corner shop and an unpaved area or forecourt which bordered the pavement of a public highway. The defendant had left his car unlighted during the hours of darkness on the unpaved forecourt. This unpaved area had once been separated from the highway by a wall but that had been removed and there was no physical separation between the unpaved area and the public pavement. The defendant's customers were in the habit of crossing the unpaved forecourt to enter his shop and an adjoining shop as well. The magistrate held that the unpaved forecourt was not a road within the meaning of the definition to which I have referred earlier and dismissed the information. Lord Goddard, delivering the judgment of the court, distinguished *Bugge v. Taylor*[2], saying of it[3]: "In "fact, the hotel proprietors allowed the place to be used as though it "were part of the road." He then added: "It would be impossible to "hold that this little piece of land, which was only used by the "customers of the shop, is a road. The magistrate heard the evidence "and came to the conclusion that this was a piece of private property "which the public did not habitually use as they used the forecourt in "*Bugge v. Taylor*[2]. Therefore I think that he was entitled to find that "it was not a public highway." Our attention was also directed to *Walshe v. Taggart*[4], a decision of this court, in which it was held by Andrews L.C.J. and Black L.J., Porter L.J. dissenting, that the words "any place to which the public have or are permitted to have access" in section 24 of the Vagrancy Act, 1824, as amended by section 57(1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, did not include private places to which the public had, in fact, gone without the permission or acquiescence of the owner. That decision related to a different code and turned on the construction of a different wording from that with which we are concerned, and I do not think it has any very direct bearing on the question now before us. Reference, however, may be made to one point of distinction which appears clearly in that part of the judgment of Black L.J. where he says[5]: "I cannot see any escape from the view "that, if the words 'to which the public have.... access' are to be

1 [1951] 2 K.B. 620.
2 [1941] 1 K.B. 198.
3 [1951] 2 K.B. at 622.
4 [1951] N.I. 1.
5 [1951] N.I. at 19.

"construed as meaning to which the public have access in fact, then "the words 'or are permitted to have access' are quite superfluous." In *Glynn v. Simmonds*[1] a Divisional Court (Lord Goddard C.J., Devlin and Gorman JJ.) had to consider the meaning of the words "place of public resort" as used in section 4 of the Vagrancy Act, 1824. The place in question was Tattersall's enclosure at Goodwood to which members of the public were admitted on payment of 30s. The court held that despite the charge for admission this enclosure was a "place of public resort". In the course of his judgment Lord Goddard said[2]: "A place does not cease to be a place of public "resort because the public have to pay to go there." And later: "It must be to some extent a question of degree, but I cannot see that "property to which the owner invites the public to resort becomes "any the less a place of public resort because he refuses to allow a "particular individual or individuals to enter. If he limits admission "to a certain category of people, for instance, if he allows only "members of the universities of Oxford or Cambridge to go to a "stand or a window he has got at the Boat Race, it may be said that "that stand or window is not a place of public resort. It has been "suggested to us that a good analogy is the Royal Enclosure at "Ascot, but that is not a place of public resort because the public are "not invited to go to the Royal Enclosure. Those who wish to go to "the Royal Enclosure have to apply for permission. Everybody is "invited to Tattersall's enclosure, subject to his paying 30s. and "subject to the right of the keeper of the gate to say he will not be "allowed to enter. The justices have found that the enclosure was a "place of public resort, and, in my opinion, they had no option since "it did not cease to be a place of public resort because a payment for "entry was demanded, nor, in my judgment, did it cease to be a place "of public resort because the occupier reserved the right to refuse "admission to some particular individual or individuals."

In *Russell v. Thompson*[3], this court had to consider section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, which provides penalties for riotous, disorderly and indecent behaviour " in any.... place to which the public have or "are permitted to have access"—the expression considered in *Walshe v. Taggart*[4]. The respondent in that case had been charged at petty sessions with disorderly behaviour at a dance organised by a local branch of the British Legion, which was advertised publicly and admission to which was gained by payment at the door. It was

1 [1952] 2 All E.R. 47.
2 Ibid. 48.
3 [1953] N.I. 51.
4 [1951] N.I. 1.

argued for the respondent that, where a person pays for admission to premises, he enters, not as a member of the public, but by virtue of a private contract with those in charge of the premises. The court, however, rejected this submission and were of opinion that the hall in which the dance was held was a "place to which the public have or "are permitted to have access", notwithstanding the charge and the right of the management to refuse admission.

In *Buchanan v. Motor Insurers' Bureau*[1], the question was whether a road within the premises of the Port of London Authority was a road within the meaning of section 121(1) of the Road Traffic Act, 1930, which, as already mentioned, provided that "road" includes "any other road to which the public has access". McNair J. held that, as the statute law stood at the material time, the answer should be in the negative. From the facts of the case it appears that passes were required by persons entering the dock area within which the road lay, and that the Port of London Authority police had instructions to refuse permission to enter that area to any unauthorised person. After referring to the judgment of Lord Clyde and Lord Sands in *Harrison v. Hill*[2] as giving him clear guidance the learned judge said[3]: "It seems to me that it is quite impossible for me to hold "that the place where this accident happened was a road to which the "public, by which I mean the general public, have access either as a "matter of legal right or by tolerance of the Port of London "Authority." It is, I think, important to note that the facts in *Buchanan v. Motor Insurers' Bureau*[1] were such as to place those admitted to the dock area in much the same category as those who, in *Harrison v. Hill*[2], used the road leading to the farmhouse for the purpose of visiting or doing business there, for in both instances permission to enter rested on a personal basis. To enter the premises of the Port of London Authority the individual had to receive a pass authorising him to enter, a position which seems to me altogether different from that in which an owner of premises allows members of the public to enter as such, but with the right to exclude any to whose entry he may object.

In *Paterson v. Ogilvy*[4], the Court of Justiciary had to consider whether an official parking ground at the Royal Highland Show was a public place within the meaning of section 15(1) of the Road Traffic Act, 1930. Normally, this parking ground was a private field used for the grazing of sheep. For the duration of the Show it was

1 [1955] 1 All E.R. 607.
2 1932 S.C. (J.) 13.
3 [1955] 1 All E.R. at 609.
4 1957 S.C. (J.) 42.

used as a car park and motorists desiring to keep their vehicles there had to pay a fee of 10s. for the privilege. The public in general were not invited to use the field and were not in the habit of doing so. The respondent, a motorist who had used this parking ground, was acquitted by the sheriff-substitute when charged under section 15(1) on the ground that the park was not "a road or other public place". The Court of Justiciary held that the park was a public place within the meaning of the statute. In his judgment Lord Thomson, Lord Justice-Clerk, said[1]: "The fate of this appeal depends on whether the "distinction drawn by the sheriff-substitute between the public in "general and a limited section of the public is a sound one. It seems "to me that this field was used by the public. Indeed they were "invited to use it. It is quite true that they had to pay for the use, "but that meant no more than that the invitation to the public to use "the field was not unrestricted but was to a certain extent selective, "and I cannot see that the fact that a payment was made makes any "difference to the case. In any event not everybody paid but only the "actual car owner, and no doubt, although perhaps the case is not "very specific about this, there were other people about, passengers "and so forth, in addition to the actual car owners, and certainly "there were several attendants, and it would appear from what "happened that the police were there directing or assisting to direct "the traffic, a feature which may be not without significance when "one is considering whether it was a public place. No doubt the field "was ordinarily a private field, but it ceased to be private and was "converted into a public place when the public were invited to use it "and it was not restricted in any way to the private friends of the "owner of the field. The fact remains that certainly any member of "the public who was prepared to pay the fee and possibly others were "free to enter the field. I cannot see that it was any the less a public "place because it was frequented by a special section of the public. "The distinction which the Sheriff-substitute has drawn is one which "has no proper justification, and it does not appeal to me in the least. "On the facts here there was a sufficiently wide invitation to the "public and a sufficiently wide use of this place by the public to come "under the words 'other public place' in the sense of the statute." Lord Mackintosh, in the course of his judgment, added this[2]. "In "these circumstances I agree with your Lordship that it is really a "false distinction to draw between the public in general and the more "or less selective class of the public who were entitled to use this field, "namely, those who were motorists and were attending the Show and

[1] 1957 S.C. (J.) at 44. [2] Ibid. 45.

"were ready to pay the necessary fee. As I have said already, these "persons could be any member of the public who was attending the "Show and was willing to pay the necessary charge for parking his "car in the field." In *Griffin v. Squires*[1], a Divisional Court (Lord Parker C.J., Streatfield and Diplock JJ.) had to consider whether a car park owned by a local authority and open to the public for parking cars was a road within the meaning of section 121 of the Road Traffic Act, 1930. The respondent had been charged with offences under section 4(1) and section 35 of that Act which made it, respectively, an offence to drive a motor vehicle without a licence and to use a vehicle while uninsured "on a road", as defined by section 121, not, be it noted, "on a road or other public place". The court held that the justices were entitled to find, as a finding of fact, that the car park, as a car park, was not a road within this definition. It undoubtedly was a place to which the public had access, but that was not relevant to the charges in question and this part of the decision is not, therefore, now in point. The material part is that which dealt with a further contention to the effect that the car park was a road because certain persons had to cross it to get to a private path leading to a bowling club and council allotments. On this branch of the case the court, founding on *Harrison v. Hill*[2], held that those going to the allotments and the bowling green were not the public for the purposes of the definition.

Regarded in the light of their particular facts, and apart from some obiter dicta, these decisions do not seem to me to displace the tentative views, based on the text and purpose of the Act of 1955, which I have already shortly expressed. In so far as relevant to this appeal I would now restate my conclusions on the definition of "road" in section 75 of that Act as follows:—

1. As respects private property, "access" means access by permission, either express or to be implied from acquiescence or other conduct on the part of the owner or occupier. It does not mean access in fact and irrespective of the will of the owner or occupier.

2. "The public" means the public at large or a substantial section thereof. What constitutes a substantial section for this purpose must be determined with regard to the relevant circumstances and the dominant object of the statute, namely, the protection of the public. Generally, the decision will be a matter of fact and degree, but whether the material for consideration suffices to support one view or the other is a matter of law.

[1] [1958] 3 All E.R. 468. [2] 1932 S.C. (J.) 13.

3. But those who are allowed to enter private property, not as members of the public, but for reasons in some way personal to the individuals admitted, will not be regarded as the general public or a substantial section thereof, and their admission will not constitute the giving of access to the public for the purposes of the definition. Pass holders entering a dock area, or employees going to work along a factory road, for example, do not bring the definition into play because they obtain access, not as members of the public, but on the strength of a relationship between the individual and the owner or occupier concerned. So, too, with those who visited the farm in *Harrison v. Hill*[1] for social or business purposes. Apart from any question as to whether, as a class, they could be reckoned a significant section of the public, the invitation or permission under which they entered was in no sense addressed or given to the public. This decision marks the clear distinction existing between these visitors and those allowed to walk on the road. The latter gained access as members of the public. The former did not.

It remains to apply these conclusions to the present case. The carriageways of Mr. Millar's station must be regarded as carriageways or roadways within the definition; and there can be no doubt that motorists seeking petrol or oil at this station enter upon and use these carriageways with the owner's permission. This leaves the question: Is the motoring public to which Mr. Millar grants access—I shall leave out of account those who resort on foot to the premises—a sufficiently substantial section of the general public to be regarded as "the public" for the purposes of the statutory definition of "road"?

The time was when motorists were so few and far between that, from the point of view of their protection from the risks of the road, they could hardly have been regarded as forming a substantial section of the general public. But that day has long gone, and under modern conditions it seems to me impossible to say that motorists, as a class, are not, from that point of view, a sufficiently substantial section of the public to rank as "the public". It is true that Mr. Millar's invitation could only be accepted by those motorists travelling along the Lisburn-Moira Road, but a limitation of that kind must necessarily apply to the access of the general public to any particular place, and, in my opinion, it is not a significant restriction. The fact is that the owner of this filling station invites all motorists travelling along this main road to use the station and its carriageways, and I think it would be parting company with reality to suggest that those invited in these circumstances are not "the public" within the

[1] 1932 S.C. (J.) 13.

meaning of the definition of "road" contained in section 75, provided —and this is the heart of the case as I see it—they are granted access as members of the public.

The permission to enter this filling station is not, in the ordinary course of business, related to any personal qualification on the part of individual customers. Mr. Millar caters for them as members of the public and they deal with him as one who supplies petrol and oil and is prepared to meet the demands of the travelling public for these commodities. It was said that access to the station carriageways is offered and accepted for business reasons and that there is therefore a personal relationship between the invitor and his invitees, such as existed between the farmer in *Harrison v. Hill*[1] and those who visited his farm for business or social reasons. But a business purpose is not incompatible with permission to enter being granted to members of the public as such, and there is a world of difference between the farmer's invitees in that case and those of Mr. Millar. Admission to his station does not depend on who the individuals admitted are. They are served as they come from the highway and, in my opinion, the only reasonable conclusion is that Mr. Millar permits them to enter *as members of the public*. I would accordingly hold that the motorists who have access to the carriageway of this station are "the public" for the purpose of the definition.

The resident magistrate stated his finding as a finding of fact but, on the view I have taken, the evidence before him was incapable of sustaining that finding, namely, that the carriageway or forecourt where the vehicle was found was not "a road or other public place" within the meaning of section 39 of the Act of 1955. I would therefore answer the question submitted in the negative.

This means that the case must go back with a direction to proceed according to law, That being the position, I think it right to add two comments, one respecting this case and the other of a more general nature.

The complaint in the summons laid the offence charged as having taken place " in a public place, to wit, in the forecourt of Millar's "Filling Station at Carnlougherin on the main Lisburn-Moira "Road....". That seems to me a sufficient description. Though the carriageway in question is a road and therefore not an *other* public place within the meaning of section 39(1), it is, as I have already said, a public place, and the description given in the summons leaves no reasonable doubt as to the location of the charge once "forecourt" is

[1] 1932 S.C. (J.) 13.

understood as a reference to the carriageways, and that has been accepted as the meaning throughout these proceedings. The distinction between "any road" and "other public place" may, on occasion, be difficult to determine and, as at present advised, I do not think a complaint or order which described the locus as "a road or "other public place" would necessarily be bad for duplicity. Here, the appropriate word, on the conclusions I have reached, would be "road". For the reasons mentioned, however, the summons is not, in my opinion, vitiated by the wording it uses and, accordingly, if, when the hearing is resumed, the resident magistrate finds that the defendant was, at the material time, under the influence of drink or drugs to such an extent as to be incapable of having proper control of his vehicle, there should be a conviction.

My general comment relates to the fact that though this case was heard and determined on September 5, 1957, the case stated was not signed by the resident magistrate until February 2, 1959. After that there was no delay in setting down. But the time taken to prepare and deliver the case was far too long. This is not an isolated instance. Delays of this sort occur too frequently and comment by this court has not, so far, had the desired effect. Such delays are bad for the administration of justice, particularly when, as here, the case has to be remitted for the taking of further evidence. I appreciate that it is common practice either to submit the draft of a case stated to the representatives of the parties for their consideration or else to get them to submit a draft. I do not wish to condemn this practice in general terms for it has certain virtues, but the magistrate is responsible for stating the case and if this course of procedure seems likely to cause delay it is his duty to see that such a result does not occur. Finally, I would add that the prejudicial effect of delay of this sort on the due administration of justice would be lessened if magistrates completed the hearing of evidence, as far as possible, before stating a case. I realise that the jurisdiction to state a case normally arises on the determination of the complaint (section 10 of the Criminal Justice Act (Northern Ireland), 1945) and that, on occasion, it may be proper to determine a complaint on a legal submission made after the conclusion of the complainant's case and before the evidence for the defence has been adduced. But where a point of law arises, the more convenient course, in many cases, will be for the magistrate to hear all the evidence before submitting the question of law for the consideration of this court. In this way, the ultimate findings of fact may make an appeal unnecessary, and where there is an appeal the court of first instance will be less likely to have to reopen the hearing and

proceed to determine issues of fact months, and it may be years, after the events which led to the original complaint.

BLACK L.J.: In this case the respondent was prosecuted on a charge of having been found in charge of a motor lorry in a public place, to wit, the forecourt of a filling station on the main Lisburn-Moira road, while under the influence of drink or drugs to such an extent as to be incapable of having proper control of the vehicle contrary to section 39 of the Road Traffic Act (Northern Ireland), 1955. Section 39 of the Act of 1955 enacts that "Every person who "drives or attempts to drive, or is in charge of, a motor vehicle on "any road or other public place, while he is under the influence of "drink or drugs to such extent as to be incapable of having proper "control of the vehicle, shall be guilty of an offence....". The resident magistrate dismissed the summons on the ground that the forecourt of the filling station as described in the case stated where the vehicle was found was not a road or other public place within the meaning of section 39. The question for this court is whether he was right in law in so holding.

This question turns upon the meaning to be given to the phrase "public place" in section 39, for the charge against the defendant was of being found in charge of a lorry not on a "road", but in a "public "place".

As has repeatedly been said (e.g. by Palles C.B. in *O'Connor v. Synott*[1]) the phrase "public place" when used in statutes has no fixed or uniform meaning. Its meaning may be wider or narrower depending on the scope and intention of the statute and the evil with which the statute seeks to deal. Section 39 of the Act of 1955 is obviously designed to protect the public from the dangers which arise from drunken drivers being in charge of motor vehicles. These are dangers which may be met with in all sorts of places where motor vehicles may be encountered by the public. Accordingly, the nature of the evil with which the section is designed to deal prima facie indicates that a wide construction should be given to the phrase "public place" as used in section 39. Moreover, section 39 speaks of "a road or "*other* public place", not simply of "a road or public place". This wording "a road or *other* public place" shows that a road is just one type of what the statute means by "public place". No doubt the reason why "road" is mentioned specifically is that the offence created by section 39 is one which will be most frequently committed on roads. In section 75(1) of the Act "road" is defined as including a

[1] (1902) 36 I.L.T.R. 239.

public road and any street, carriageway, highway or roadway to which the public has access. This is clearly intended to be a wide definition. And remembering that section 39 regards a "road" as one type of "public place" it seems to follow that the Legislature must have intended the phrase "public place" to be given a correspondingly wide significance and to mean (in the words of the definition of "road") any place to which the public has access.

What then is meant by the phrase "to which the public has "access"? Section 39 of the Road Traffic Act (Northern Ireland), 1955, under which the defendant in the present case was prosecuted follows closely (so far as material) the wording of section 15 of the Road Traffic Act, 1930, a statute of the Parliament of the United Kingdom which did not apply to Northern Ireland, and by section 121(1) of this Act of 1930 "road" is defined as meaning any highway and any other road to which the public has access. The English and Scottish courts in a number of reported cases have had to consider whether places where offences under the Act of 1930 have been alleged to have been committed fell within the description of places to which the public had access, but from the very nature of the subject matter they have not been able to formulate any precise or exhaustive definition by reference to which every case could be decided. In *Elkins v. Cartlidge*[1], Lord Goddard C.J., after referring to the definition of "road" in the Act of 1930 is reported as having said that the phrase "public place" must be read as meaning a place to which the public have access in fact. With respect, however, I think this is expressed too widely, as it might be said that the public had access in fact to the grounds of a suburban villa if the owner chose to have no gate barring the entrance from the road. I do not think a place can be legitimately called a public place or a place to which the public has access if the nature of the place suggests that only persons in their individual capacities may enter, such persons for example in the case of a suburban villa as the postman, the milk roundsman, the various tradesmen and message boys, and visitors to the house on social occasions. This view is borne out by the cases in which it has been held that roads are not public places within the meaning of the statutes if entry to them is limited to employees of the owners of the property or to persons holding passes: *O'Brien v. Trafalgar Insurance Co. Ltd.*[2]; *Buchanan v. Motor Insurers' Bureau*[3]. In one case which was not cited during the argument, the Scottish case of *Davidson v. Adair*[4], the court held that a private drive up to a dwelling house was a

[1] [1947] 1 All E.R. 829.
[2] (1945) 61 T.L.R. 225.
[3] [1955] 1 All E.R. 607.
[4] 1934 S.C. (J.) 37.

road within the meaning of the definition in the statutes. I confess, however, that in my view this gives much too wide a meaning to the definition though I should think that the actual decision of the sheriff-substitute in that case could well be supported on the ground indicated by Lord Murray in his judgment.

On the other hand the phrase "a place to which the public has "access" is clearly not to be construed as meaning merely a place to which the public has an absolute right to resort whether by reason of some dedication or permission on the part of the landowner or otherwise. A place in private ownership and under private control may well be a place to which the public has access within the meaning of the statute. This is agreed by all the authorities both English and Scottish to which we have been referred (e.g. *Bugge v. Taylor*[1]; *Harrison v. Hill*[2].) To my mind an excellent exposition of what is intended by the phrase "to which the public has access" is to be found in the concluding sentence of Lord Sands' judgment in *Harrison v. Hill*[3]: "In my view, any road may be regarded as a road "to which the public have access upon which members of the public "are to be found who have not obtained access either by overcoming "a physical obstruction or in defiance of prohibition express or "implied." I would be content to adopt this description with the qualification that the members of the public referred to in it are to be distinguished from such persons as I have already mentioned, e.g. message boys, employees or social visitors, or persons like the limited classes of callers at the farmhouse mentioned in the report of *Harrison v. Hill*[2] who come upon premises not as members of the public but in their individual capacities.

In the present case the owner of the filling station maintains his filling station for the purpose of selling petrol to the public and has designed the station so as to facilitate the access to it of members of the public who may be minded to purchase petrol. There is no suggestion that he selects his customers: any member of the public who wishes is welcome to have access to the premises to purchase the owner's wares and there is no physical obstruction to the access of the public to the premises. No doubt the vast majority of persons who will come upon the premises will drive in in motor vehicles. But I do not think that this fact will prevent it from being said that the place is one to which the public has access. In *Paterson v. Ogilvy*[4], the respondent was charged with being drunk in charge of a motor car in

[1] [1941] 1 K.B. 198.
[2] 1932 S.C. (J.) 13.
[3] Ibid. 17.
[4] 1957 S.C. (J.) 42.

a car park of the Royal Highland Show at Inverness. This car park was a private field, normally used for grazing sheep, but for the duration of the Show it was being used as a parking place and motorists desiring to park their vehicles there had to pay a fee of 10s. before entering the field. The public in general were not invited to use the field and were not in the habit of doing so, and at the material time the field was set aside and used for the restricted purpose of being a parking-place for motorists attending the Show who had paid the necessary fee. The High Court of Justiciary held that on these facts the sheriff-substitute was not entitled to hold that the said parking place was not a "road or other public place" within the meaning of section 15 of the Road Traffic Act, 1930. Some of the dicta in the judgments in *Paterson v. Ogilvy*[1] appear to me to be particularly apposite to the present case. The Lord Justice-Clerk (Lord Thomson) says[2]: "The fate of this appeal depends on whether "the distinction drawn by the Sheriff-substitute between the public "in general and a limited section of the public is a sound one. It "seems to me that this field was used by the public. Indeed they were "invited to use it. It is quite true that they had to pay for the use, but "that meant no more than that the invitation to the public to use the "field was not unrestricted but was to a certain extent selective, and I "cannot see that the fact that a payment was made makes any "difference to the case." And later Lord Thomson continues: "No doubt the field was ordinarily a private field, but it ceased to be "private and was converted into a public place when the public were "invited to use it and it was not restricted in any way to the private "friends of the owner of the field. The fact remains that certainly any "member of the public who was prepared to pay the fee and possibly "others were free to enter the field. I cannot see that it was any the "less a public place because it was frequented by a special section of "the public. The distinction which the Sheriff-substitute has drawn is "one which has no proper justification, and it does not appeal to me "in the least. On the facts here there was a sufficiently wide invitation "to the public and a sufficiently wide use of this place by the public to "come under the words 'other public place' in the sense of the "statute."

Lord Mackintosh concurred in the judgment of Lord Thomson saying[3]: "I agree with your Lordship. The field in question was "certainly a private place normally, but during the duration of the "Highland Show it was, in my opinion, a public place within the

[1] 1957 S.C. (J.) 42.
[2] Ibid. 44.
[3] Ibid. 45.

"meaning of these words as used in section 15 of the Road Traffic "Act, 1930. I say that for the reason that the public were invited to "use it, albeit they had to come there with a motor car and with 10s. "to pay for entry money, but, apart from that, any member of the "public was entitled to come there and use this parking-place during "the continuance of the Highland Show at Inverness. In these "circumstances I agree with your Lordship that it is really a false "distinction to draw between the public in general and the more or "less selective class of the public who were entitled to use this field, "namely, those who were motorists and were attending the Show and "were ready to pay the necessary fee. As I have said already, these "persons could be any member of the public who was attending the "Show and was willing to pay the necessary charge for parking his "car in the field. For these reasons I think that the field was a public "place for the purposes of section 15 of the Road Traffic Act, 1930."

Lord Blades also concurred saying[1]: "I have had more difficulty "than your Lordships in coming to the conclusion at which you have "arrived, and that for this reason, that the Sheriff-substitute has "found as a fact that the field was set aside and used for the restricted "purpose of being a parking-place for motorists attending the Show "who have paid the necessary parking fee. But on looking again at "*Harrison v. Hill*[2] I see that the Lord Justice-General said that a "road, to fall within the section, must be one to which the public has "access. If that test is applied to the circumstances of the present "case, I am driven to the conclusion that this field was a place to "which the public had access. Quite true it was only the motoring "public that had access to it, but the motoring public at a function "like the Highland Show would not be restricted in numbers. There "would be a large congregation both of people and of vehicles."

If the decision in *Paterson v. Ogilvy*[3] is sound—and if I may most respectfully say so both the decision itself and the reasoning in the judgments delivered in the High Court of Justiciary appeal to me as being good law and good sense—it appears to me to follow that the forecourt of the filling station in the present case must be held to be a public place. It is designed to attract and indeed to facilitate the access to it of the public especially those members of the public driving motor vehicles. Access to it is attained without (to use Lord Sands' phrase) either overcoming a physical obstruction or in defiance of prohibition express or implied. And according to *Paterson v. Ogilvy*[3] it is none the less a public place merely because members of

[1] 1957 S.C. (J.) at 45.
[2] 1932 S.C. (J.) 13.
[3] 1957 S.C. (J.) 42.

the public are likely to avail themselves of the facilities which it offers only when they are in charge of motor vehicles. Accordingly I agree that the question submitted in the case stated for the decision of this court should be answered in the negative.

It is right, however, to point out that it is not my view that every place where the tank of a motor vehicle can be replenished from a petrol pump is necessarily a public place. Thus the mere fact that there was a set of petrol pumps inside an ordinary commercial garage would not serve to render the garage a public place. In many cases the question may be essentially a question of fact. In the present case, however, on the facts set out in the case stated the only possible conclusion appears to me to be that the filling station was a public place. I do not regard of any importance the fact that the owner of the filling station had on several occasions removed children from the premises. Many a shopkeeper whose shop is set back some distance from the edge of the highway has on occasions to chase children away from the front of his premises even though the place on which they are disporting themselves may have become a public place. And I should not be surprised if the attendants at the car park in *Paterson v. Ogilvy*[1] may sometimes have found it necessary to remove children who were playing among the cars. Nor would I attach any weight to the fact that the owner of the filling station would remove anyone he found trespassing on it. It does not appear that he ever in fact took this course. But in any event one would imagine that it was part of the duty of the car park attendants in *Paterson v. Ogilvy*[1] to remove any obvious trespasser from their car park.

At the outset of this judgment I mentioned that the charge against the respondent was that he was found under the influence of drink or drugs in charge of a motor lorry in a public place contrary to section 39 of the Act of 1955. The summons did not charge him with being in charge of a lorry on a road. In view of the definition of road in section 75(1) of the Act of 1955 as including any carriageway, highway or roadway to which the public has access, it is arguable that the place where the respondent was in charge of the lorry was a road within the meaning of section 39 of the Act of 1955. I am not sure about this. I doubt for example if section 34 or section 49 of the Act of 1955 was intended to apply in such a place as Mr. Millar's filling station. However this may be I do not think the matter is one of any importance for as I pointed out earlier in this judgment the

[1] 1957 S.C. (J.) 42.

phrase "any road or *other* public place" in section 39 of the Act shows that road and public place are not true alternatives, that a road is just a type of public place, so that a charge of an offence under section 39 as having been committed in a public place would be perfectly good even though it turned out that the locus was a road within the definition in the Act. The converse, however, would not of course hold good. In *Purves v. Muir*[1], the appellant had been convicted under section 15 of the Act of 1930 of having been drunk in charge of a motor car on a road. The place where the offence was committed was a somewhat peculiarly laid out courtyard. The Court of Justiciary quashed the conviction on the ground that the courtyard could not properly be described as a road within the sense of the definition in the statute. But Lord Jamieson hinted[2] that other considerations might have arisen if the charge laid against the appellant had been of having been drunk in charge of the car in a *public place*.

CURRAN L.J.: The distinction between access to a farm by the public generally, and access by the special class of members of the public who have occasion, for business purposes, to visit a farm, was recognised in *Harrison v. Hill*[3].

In my opinion it can make no difference in principle if the farmer puts up a notice inviting the public to enter his property to purchase his produce. Nor can it, in my view, make any difference in principle whether only a few or a great number of customers come to the farm. I have in mind one farm where eggs are sold each day, attracting many customers both in cars and on foot. Whether persons have access to a place *as members of the public* cannot be determined, in my view, by ascertaining whether access by the public is limited or unlimited in numbers. It must be the capacity in which persons lawfully enter the place that determines whether or not they have access thereto as *members of the public*.

In the present case it is said that a substantial section of the public use the place in question, namely, motorists. But in what capacity have they access to the place? It is not simply as members of the general public, it is as customers, to do business with the proprietor — just as members of the public have access to farms to do business with the farmers.

I would answer the question submitted in the affirmative.

Appeal allowed.
Case remitted.

[1] 1948 S.C. (J.) 122.
[2] Ibid. 126.
[3] 1932 S.C. (J.) 13.

Solicitor for the appellant: *Chief Crown Solicitor.*
Solicitor for the respondent: *J. G. Lennon.*

J.P.

INDEX

ANIMAL—*Dog—Worrying Sheep—Right to shoot—Dogs Act (Northern Ireland)*, 1927 (17 *Geo.* 5, *c.* 3). *Civil bill—Case stated by Judge of Assize—No jurisdiction in Court of Appeal to send case back for further findings of fact—Civil Bill Courts Procedure Amendment Act (Ireland)*, 1864 (27 & 28 *Vict. c.* 99), *s.* 35. The defendant discovered two dogs barking and snapping at his sheep in his field. He shouted at the dogs which ran away, one of them going into another field where there were no sheep. The defendant pursued this dog into the other field and shot it dead. In civil bill proceedings for damages for the shooting of the dog the defendant contended that the shooting was justified on the principles laid down in *Cresswell v. Sirl* [1948] K.B. 241. It was found as a fact that if the defendant had not driven the dogs away one or both of them would have physically attacked the sheep, and further that a dog which has attacked sheep in a flock will return to attack sheep in the same flock. On the hearing of a case stated by the judge of assize, on appeal from the county court judge, raising the question whether on the facts found the defendant had any answer in law to the plaintiff's claim—. *Held*, (i) that even if the facts found showed the defendant to have brought himself within the first proposition laid down in *Cresswell v. Sirl* (supra), namely, by showing that at the time of the shooting the dog was either (a) actually attacking the sheep, or (b) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented; yet there were no findings of fact to satisfy the second proposition in that case, namely, that either (a) there was in fact no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack; (ii) that there was no jurisdiction in the court to send the case back for further findings of fact. *Quaere* whether the principles laid down in *Cresswell v. Sirl* (supra) are applicable in Northern Ireland having regard to the provisions of the Dogs Act (Northern Ireland) 1927. *Eccles v. McBurney* [C.A. 15

BETTING 98
See CASE STATED.

CASES—
Cresswell v. Sirl [1948] 1 K.B. 241 considered 15
See ANIMAL.
Downshire v. O'Brien (1887) 19 L.R.Ir. 380, 390. Observations of Chatterton V.-C. applied .. 46
See MARKET.
Great Eastern Railway v. Goldsmid (1884) 9 App. Cas. applied 46
See MARKET.

CASE STATED—*Jurisdiction of resident magistrate to state a case—Application for certificate of suitability of bookmaker's premises—Not an "information "or complaint"—Betting and Lotteries Act (Northern Ireland)*, 1957 (5 & 6 *Eliz.* 2, *c.* 19), *s.* 6—*Criminal Justice Act (Northern Ireland)*, 1945 (9 & 10 *Geo.* 6, *c.* 15), *s.* 10. The decision of a court of summary jurisdiction on the hearing of an application under section 6(1) of the Betting and Lotteries Act (Northern Ireland), 1957, for a certificate of suitability of bookmaker's premises cannot be the subject of a case stated because it is not the determination of an "in-"formation or complaint" within the meaning of section 10 of the Criminal Justice Act (Northern Ireland), 1945. *McGimpsey v. O'Hare* [C.A. 98

——CIVIL BILL 15
See ANIMAL.

CIVIL BILL—CASE STATED .. 15
See ANIMAL.

COMPENSATION—PLANNING .. 62
See NORTHERN IRELAND.

——COMPULSORY ACQUISITION OF LAND 161
See COMPULSORY ACQUISITION OF LAND.

COMPULSORY ACQUISITION OF LAND—*Compensation—Works not constructed on lands acquired from claimant—Whether compensation payable for depreciation of claimant's farm due to proximity of sewage disposal works and discharge of effluent into stream—Injurious affection—Local Government Act (Northern Ireland)*, 1934 (24 & 25 *Geo.* 5, *c.* 22), *s.* 22(1); *Sch.* 2 *art.* 10(1). Lands belonging partly to the claimant and partly to an adjoining owner were ac-

quired by a local authority for the purpose of constructing a sewage disposal works. The lands acquired from the claimant constituted only a small portion of her holding and the actual physical structure of the sewage works was situate entirely on the lands acquired from the adjoining owner. Non-deleterious effluent was discharged into a stream in respect of which the claimant was a riparian owner. The claimant claimed compensation in respect of the depreciation in the value of the lands she retained due to the proximity of the sewage disposal works and the discharge of effluent into the stream. *Held*, that no compensation was payable because, (i) the user in respect of which the claim was made did not take place on lands acquired from the claimant, and (ii) the discharge of non-deleterious effluent into the stream by the local authority was the exercise of their normal riparian right and this did not in any way depend upon the acquisition of any part of the claimant's lands. *Rainey v. North Down Rural District Council* [Q.B.D. 161

COSTS— 141
See PRACTICE—COSTS.

DAMAGES—EXCESSIVE DAMAGES 109
See NEGLIGENCE.

DOG—WORRYING SHEEP 15
See ANIMAL.

FACTORIES ACTS—*Baling machine being used on farm premises—Whether premises a "factory"—Dangerous machinery—Factories Act (Northern Ireland)*, 1938 (2 *Geo.* 6, *c.* 23), *ss.* 15, 157. A agreed to sell to B a quantity of straw which he had in a shed on his farm and it was a term of the agreement that B should bring a baling machine to bale the straw on the farm. While the plaintiff, a farm labourer employed by A, was assisting in the baling operations he put his hand through a slot in the side of the machine in order to rescue a hen which had flown into the machine, and received severe injuries. The plaintiff sued both A and B for damages, alleging against each of them negligence and breach of statutory duty under section 15 of the Factories Act (Northern Ireland), 1938. The trial judge ruled that there was no evidence of negligence against A, and the jury, in answer to questions submitted to them, found (a) that the part of the baler where the plaintiff was injured was a dangerous part of the machinery, and (b) that B had not been guilty of negligence in using the baler with the slot unguarded. The trial judge held that the Factories Act (Northern Ireland), 1938, did not apply to the premises, and having regard to the jury's findings he gave judgment for the defendants. *Held*, by the Court of Appeal, (i) that, notwithstanding the finding that the machine was dangerous, the jury was entitled to find that B had not been negligent, and that on the evidence the trial judge was right in refusing to leave to the jury any question whether A had been negligent, (ii) that although on a literal reading of section 157 of the Act of 1938 A's premises might fall within the definition of a factory contained in that section, yet neither the farm as a whole nor that part of it where the baling was being carried out constituted a factory for the purposes of the Act, and accordingly neither defendant was under any obligation under section 15 of the Act to fence securely any dangerous machinery. Decision of Lord MacDermott L.C.J. affirmed. Observations by Black L.J. on the test to be applied in determining whether machinery is dangerous for the purpose of section 15 of the Factories Act (Northern Ireland), 1938. *Kerr v. Mitchell* [C.A. 21

LIMITATION OF ACTIONS .. 106
See PRACTICE—PLEADING.

MARKET—*Disturbance—Rival market—Purchase outside—Market in live pigs and pig carcases—Scheme between Ministry and co-operative society whereby live pigs and pig carcases sent to society's premises—Whether rival market—Object of scheme not the evasion of tolls—Whether any other form of disturbance.* The respondent company was the owner of the market place and market rights at Enniskillen, in the county of Fermanagh, Northern Ireland. The company's rights as market owner extended to numerous commodities including live pigs for slaughter of bacon weight and pig carcases. Prior to 1934 the market in pigs was confined to carcases. In 1933 an organisation called "the Pigs Marketing "Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933 ,for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area. In 1940 the Ministry of Agriculture for Northern Ireland became the sole purchaser of live pigs for slaughter, and also

the sole lawful buyer of pig carcases under the provisions of the Pig (Sales) (Northern Ireland) Order, 1940, which, however, authorised the Ministry to license bacon curers to buy carcases themselves. The appellant society and other bacon curers were so licensed by the Ministry and they attended the market at Enniskillen and bought carcases there up to July 15, 1948. Before that date the society had no abattoir of its own, but brought certain live pigs by arrangement with the Ministry to the then market owner's abattoir for slaughter. This abattoir was closed down in 1947 and was not purchased by the company when it acquired the market rights from the former market owner in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. In 1946 the society obtained permission from the Ministry to build an abattoir of its own, and the Ministry undertook to use the society's premises at Enniskillen as the principal collecting centre for County Fermanagh to which producers could bring live pigs which they had for sale. On July 19, 1948, the society's new premises were opened and the new scheme, following an advertisement in the local press, came into operation, under which live pigs bought by the Ministry were transported to the society's abattoir either at a subsidised rate or at the producer's own expense, and pigs killed on the farms were accepted by the society to be delivered at the producer's expense. After July 19, 1948, neither the society nor the Ministry had attended at the company's market and no person attending there had been able to sell pigs of bacon weight by reason of the absence of the society and the Ministry, or to sell pig carcases because of the absence of all persons authorised to purchase. Further, since that date, the society and the Ministry had ceased to pay the market owner any sum for or in lieu of tolls, and the company's claim for tolls in respect of pigs passing through the society's premises had been met by the plea that no such tolls were payable. In an action by the company against the society, the Ministry and others, for alleged disturbance of its market rights by levying a rival market and otherwise:— *Held*, (1) that there was no levying of a rival market as the society's premises did not provide facilities for a concourse of buyers and sellers which was the essential feature of such a market. *Great Eastern Railway Co. v. Goldsmid* (1884) 9 App. Cas. 927, and observations of Chatterton V.-C. in *Downshire v. O'Brien* (1887) 19 L.R.Ir. 380, 390 applied. (2) That there was no other actionable form of disturbance, for it could not be suggested in the circumstances that the object of the scheme was to evade the payment of toll. A sale outside the market which had or might have the effect of depriving the market owner of toll or some other advantage was an actionable disturbance only if the person selling took or sought to take the benefit of the market; accordingly, the claim failed. Decision of the Court of Appeal in Northern Ireland reversed in part. *Scottish Co-Operative Wholesale Society Ltd. v. Ulster Farmers' Mart* [H.L. 46

MASTER AND SERVANT—SAFE SYSTEM OF WORK 109
See NEGLIGENCE.

MOTOR VEHICLE—DISQUALIFICATION 1— *Disqualification from holding or obtaining a driving licence—Application for removal of disqualification—No jurisdiction to limit disqualification to vehicles of a particular class or description—Road Traffic Act (Northern Ireland)*, 1955 (4 & 5 *Eliz.* 2, *c.* 27), *s.* 57(4). Where a person who has been disqualified from holding or obtaining a driving licence makes application pursuant to the provisions of section 57(4) of the Road Traffic Act (Northern Ireland), 1955, for the removal of his disqualification, the court may either refuse the application or direct that the disqualification be removed in the manner specified in the subsection, but has no power to order that the disqualification be limited to vehicles of a particular class or description. *Mahon v. Clingen* [C.A. 37

——DISQUALIFICATION 2—*Offence involving disqualification for a minimum period—Jurisdiction to order disqualification limited to vehicles of a particular class or description—Road Traffic Act (Northern Ireland)*, 1955 (4 & 5 *Eliz.* 2, *c.* 27), *ss.* 39(2), 57(1). The proviso to section 57(1) of the Road Traffic Act (Northern Ireland), 1955, which empowers a court imposing an order of disqualification from holding or obtaining a driving licence under that section to limit the disqualification to the driving of

a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed, applies to all orders of disqualification, including such orders as the court is required to make by reason of the fact that some other provision of the Act requires an order of disqualification for a period not less than a specified minimum period. Accordingly, where a driver was convicted under section 39 of the Act for being in charge of a motor car while under the influence of drink it was *held* that the court had power to limit the disqualification for the minimum period to a motor car other than a goods vehicle. Per Lord MacDermott L.C.J. The discretion so to limit a disqualification should be used sparingly in cases of conviction for driving or being in charge of a motor vehicle under the influence of drink or drugs, and only where the public interest is not likely to be jeopardised. *Simpson v. McKenna* [C.A. 1

——Driving Licence—*Person between* 17 *and* 21 *licensed under Act of* 1926—*Licence excluding goods vehicles exceeding* 2½ *tons unladen weight—Licence renewed under Act of* 1955—*Whether licensed to drive goods vehicles up to* 3 *tons unladen weight—Motor Vehicles* (*Traffic and Regulation*) *Act* (*Northern Ireland*), 1926 (16 & 17 *Geo.* 5, *c.* 31) *s.* 3(5)—*Road Traffic Act* (*Northern Ireland*), 1955 (4 & 5 *Eliz.* 2, *c.* 27), *ss.* 3(1) (*e*), 13(1) (*d*), 18(3). By section 3(5) of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926, a person aged between 17 and 21 years was disqualified from obtaining a licence to drive a goods vehicle exceeding 2½ tons unladen weight, but under section 18(3) of the Road Traffic Act (Northern Ireland), 1955, such a person may be licensed to drive motor cars which are not "heavy "motor cars", "heavy motor cars" being motor vehicles exceeding 3 tons unladen weight. By section 13(1) (d) (ii) of the Act of 1955 a driving licence may be granted, without a driving test, to an applicant who held a licence issued under section 3 of the Act of 1926 which authorised him to drive "vehicles of the class or "description which he would be author- "ised by the driving licence applied for "to drive". On June 28, 1955, the defendant, having attained 17 years, obtained a licence under section 3 of the Act of 1926. On July 16, 1956, the licence was renewed so as to be in force until July 27, 1957; and on July 8, 1957, after the Act of 1955 had come into operation, the defendant, who was still under 21, again applied for and obtained a renewal of his licence until July 27, 1958. The defendant did not then take, nor was he called upon to take any driving test. The defendant was stopped by the police when he was driving a motor lorry of 2 tons 19 cwt. unladen weight. The policy of insurance in force in respect of the vehicle was operative only if the driver held or had held and was not disqualified from holding a licence to drive such a vehicle. *Held*, by the Court of Appeal (Lord MacDermott L.C.J. dissenting), (i) that the defendant had not, after July 1957, held a licence to drive a goods vehicle exceeding 2½ tons unladen weight, for the reason that under section 13(1) (d) (ii) of the Act of 1955 he was only entitled to obtain, without passing a driving test, a licence to drive vehicles of the "class or "description" of vehicles which he had been authorised to drive by his licence under the Act of 1926, which category did not include goods vehicles exceeding 2½ tons unladen weight; (ii) accordingly that he had been guilty of the offence of driving while uninsured. Per Lord MacDermott L.C.J. By reason of the repeal of the Act of 1926 by the Act of 1955, the licensing authority had no power to impose any restriction upon a driving licence other than those provided for by the Act of 1955; and the renewal of the defendant's licence under that Act authorised him to drive a "class" of vehicles, as defined in section 3(1) (e) of the Act, namely motor cars, which class includes goods vehicles of up to 3 tons unladen weight. *White v. Trainor* [C.A. 147

——In Charge Under Influence of Drink—*Vehicle in forecourt of filling station—Forecourt used only by persons having business with proprietor—Whether a "road or other public place"—Road Traffic Act* (*Northern Ireland*), 1955 (4 & 5 *Eliz.* 2, *c.* 27), *ss.* 39, 75. By section 39(1) of the Road Traffic Act (Northern Ireland), 1955, "Every person who.... "is in charge of, a motor vehicle on any "road or other public place, while he is "under the influence of drink.... to such "an extent as to be incapable of having "proper control of the vehicle, shall be "guilty of an offence....". By section 75 of the same Act "road" is defined as including "a public road and any street, "carriageway, highway or roadway to "which the public has access". The respondent was charged with being in charge of a motor vehicle in a public place

while under the influence of drink. The "public place" was designated in the summons as the forecourt of a filling station. The filling station was situate a few yards back from the edge of a public road and the forecourt consisted of two carriageways with a perpetually open entry and exit from and to the public road at each end of the carriageways. The owner of the filling station impliedly invited motorists to come on his premises to purchase petrol and other supplies, but excluded therefrom persons other than customers or those having business with him. *Held*, by the Court of Appeal (Curran L.J. dissenting), (i) that the motorists who were impliedly invited on to the premises were a sufficiently substantial portion of the public to constitute "the public" for the purposes of the Act of 1955; (ii) that since such motorists entered the premises with the express or implied permission of the owner they had "access" to it; (iii) and that, accordingly, the forecourt of the filling station was "a road or other public "place" for the purposes of section 39(1) of the Act of 1955. *Semble* that a defendant could properly be convicted on a summons alleging that he had been guilty of an offence against section 39(1) "in a "public place" where the offence was proved to have been committed "on a "road". *Montgomery v. Loney* [C.A. 171

NEGLIGENCE—*Master and Servant—Safe system of work—Practice in like circumstances—"Folly" to neglect precautions. Statutory duty—Factories—"Means of access" or "place of work"—Factories Act (Northern Ireland)*, 1938 (2 *Geo.* 6, *c.* 23), *s.* 27. *Damages—Assessment by jury—Power of appellate court to set aside award of jury as excessive.* The plaintiff sustained serious injuries while working on the roof of his employers' factory when he fell from a crawling ladder on to a glazed part of the roof. He was severely lacerated and his right arm had to be amputated above the elbow. His work required him to carry a bucket of cement down the ladder, which had no handrail, and at the material time he was wearing rubber boots provided by his employers, but because of water present on the roof the soles of the boots had become slippery. The plaintiff in his action against the employers claimed damages for (i) negligence, and (ii) breach of statutory duty by reason of contravention by the employers of the provisions of section 27 of the Factories Act (Northern Ireland), 1938. The employers adduced expert evidence, which was not seriously challenged, that the system of work was "perfectly in "accord with good practice". The jury found for the plaintiff and awarded him £6,520 damages, which was reduced to £5,868 in view of a finding of contributory negligence. *Held*, by the Court of Appeal (Lord MacDermott L.C.J. dissenting), that there was no evidence upon which a jury could reasonably find that the employers were negligent since the plaintiff had failed to show (i) that what the employers had failed to do was something which was commonly done by other employers in like circumstances, or (ii) that some precaution had been omitted which it would have been folly in anyone to neglect to provide. Per Lord MacDermott L.C.J. and Sheil J. For the purposes of section 27 of the Factories Act (Northern Ireland), 1938, a place cannot at the same time and for the same person be both a means of access to a place at which that person has to work and also a place of work. On further appeal *held*, by the House of Lords (reversing the decision of the Court of Appeal), (i) that the evidence as to the general practice of the trade could not be treated as conclusive evidence in favour of the employers, and that accordingly there was evidence of negligence on which a jury could find in favour of the plaintiff; (ii) that the jury's award of damages, though high, was not so extravagant as to entitle an appellate court to interfere. *Cavanagh v. Ulster Weaving Co.* [C.A. & H.L. 109

NORTHERN IRELAND—*Constitutional Law—Validity of statute—Act of Northern Ireland Parliament purporting to give power to impose restrictions on building development—Negative prohibition—"take any property without "compensation"—Reasonableness as test of validity—Act which commits test of reasonableness to executive ultra vires—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5. *c.* 67), *s.* 5(1)—*Planning and Housing Act (Northern Ireland)*, 1931 (21 & 22 *Geo.* 5. *c.* 12), *s.* 10(2). *Planning Acts—Interim development—Refusal of permission to build—Whether compensation payable—Planning (Interim Development) Act (Northern Ireland)*, 1944 (7 & 8 *Geo.* 6. *c.* 3), *s.* 6(4). Section 5(1) of the Government of Ireland Act, 1920, prohibits the Parliament of Northern Ireland making a law so as either directly or indirectly to take any property without compensation. The word "take"

in this provision imports not only a taking over but also a taking away, such as may be effected without any transfer or change of ownership or possession, and accordingly the imposition of a restriction or prohibition or other interference with proprietary rights may constitute a taking of property within the subsection. However, a restriction which is merely regulatory in character does not contravene the provisions of section 5(1) if (a) the legislation is directed in substance to furthering the public interest, and (b) the restriction is reasonable and proper for the purpose. But the question whether legislation of the Parliament of Northern Ireland offends the provisions of the Government of Ireland Act, 1920, is one for the courts to decide, and such legislation as purports to commit a test of validity to the executive is therefore ultra vires. Section 9(1) of the Planning and Housing Act (Northern Ireland), 1931, provides that compensation shall be payable to anyone whose property is injuriously affected by the coming into operation of a planning scheme. Section 10(2) of the same Act provides that "property shall not be deemed to be "injuriously affected by reason of the "coming into operation of any provisions "inserted in a planning scheme, which "prescribe the space about buildings or "limit the number of buildings to be "erected, or prescribe the height or "character or user of buildings, or pre-"scribe a standard of net annual value "for buildings, and which the Ministry, "having regard to the nature and "situation of the land affected by the "provisions, considers reasonable for the "purpose". The Planning (Interim Development) Act (Northern Ireland), 1944, provides that all land not the subject of a planning scheme, or of a resolution to prepare and adopt such a scheme, shall be deemed to be subject to a resolution to prepare a planning scheme; and by section 2 of that Act the Ministry was directed to make a general interim development order to apply with respect to such land. Under this power the Ministry made the Planning (General Interim Development) Order, 1944, which, inter alia, empowered the planning authority to grant permission for interim development within their area. Section 6(4) of the Planning (Interim Development) Act (Northern Ireland), 1944, provides that where an application for interim development is refused the applicant shall be entitled to obtain such compensation in respect of any injurious affection to his property by reason of the refusal as he would have been entitled to under the Planning and Housing Act (Northern Ireland), 1931, if such injurious affection had been suffered as the consequence of the coming into operation of a planning scheme. The appellants, who for many years had carried on the business of garage proprietors and motor engineers, applied for permission to erect further industrial and commercial buildings on their land, but permission was refused on the ground that the proposed development was in part contrary to the planning authority's requirements for the site relating to the height and character of buildings, and in part contrary to their requirements relating to the character and user of buildings. *Held*, (i) that section 6(4) of the Act of 1944 had the effect of incorporating a reference to section 10(2) of the Act of 1931 as well as to the compensatory provisions contained in section 9 of that Act; (ii) that the purported effect of section 10(2) of the Act of 1931 was to defeat the appellant's claim to compensation, but as that subsection empowered the Ministry to determine whether the provisions to which it applies were reasonable, it was invalid on the ground that the issue of reasonableness, as one of the tests of the constitutional validity of the legislation in question, was a matter for the established courts, and not for the executive, to decide; and that section 10(2) could not be severed so as to save its other provisions. *O. D. Cars Ltd. v. Belfast Corporation* [C.A. 62

PLANNING—VALIDITY OF LEGISLATION 62
See NORTHERN IRELAND.

PLEADING—WRIT 106
See PRACTICE—PLEADING.

PRACTICE—*Costs—Writ of summons—Payment of debt after issue but before service of writ—R.S.C. Or.* 13, *r.* 3—*Or.* 65 *rr.* 49, 51, 52. A plaintiff claiming a liquidated sum cannot enter judgment by default for his costs of the writ of summons if the debt claimed is paid after issue, but before service, of the writ. *Joseph Morton* (*Banbridge*) *Ltd. v. Boyle* [Q.B.D. 141

——PLEADING—*Writ—Indorsement of claim in negligence—Statement of Claim alleging breach of statutory duty—Separate cause of action—Limitation of actions—Law Reform* (*Miscellaneous*

Provisions) *Act* (*Northern Ireland*), 1954 (2 & 3 *Eliz.* 2, *c.* 26), *s.* 4. The plaintiff issued a writ indorsed with a claim for damages for personal injuries sustained by reason of the negligence of the defendants their servants and agents in failing to provide proper and safe plant and machinery and a safe place of work and a safe system of work. In his statement of claim, which was delivered more than three years after the accident out of which the claim arose, the plaintiff alleged not only negligence but also breach of statutory duty. *Held*, that the claim based on negligence and the claim based on breach of statutory duty were separate and distinct claims so far as the operation of section 4 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1954, was concerned, and that consequently the claim based on breach of statutory duty was statute barred and should be struck out. *Scampton v. Colhoun* [Q.B.D. 106

——SEPARATE ACTIONS—*Separate actions arising out of same accident—Application to have both actions tried together—Admission of liability by defendant—No common issue. Lynn v. Brand; Stewart v. Brand* (*Practice note*) [Q.B.D. 140

——SERVICE—*Service of summons out of the jurisdiction—Leave obtained to issue a writ for service out of the jurisdiction—Summons for final judgment—Necessity of obtaining leave to serve summons out of the jurisdiction. Northern Irish Trust v. Kennedy* (*Practice note*) [Q.B.D. 139

PUBLIC HEALTH—*Slaughter-houses—Application to Ministry of Agriculture for licence to slaughter—Provision that licence shall not issue "unless the appli-"cation is made with the approval* (*which "shall not be unreasonably withheld*) *of "the local authority"—Whether approval unreasonably withheld—Onus of proof—Slaughter-houses Act* (*Northern Ireland*), 1953 (2 *Eliz.* 2, *c.* 21), *s.* 1. Section 1(1) of the Slaughter-houses Act (Northern Ireland), 1953, empowers the Ministry of Agriculture to issue licences in respect of slaughter-houses, and subsection (3) of that section provides that the Ministry "shall not issue a licence unless the "application is made with the approval "(which shall not be unreasonably with-"held) of the local authority in whose "area the premises are situate". In a case where the local authority had refused its approval to an application for a licence it was *held*, (i) that in such circumstances the onus is on the applicant to establish that the local authority has acted unreasonably in withholding approval and not on the local authority to establish that it has acted reasonably in so doing; (ii) that the onus could be discharged only by showing that the decision of the local authority was unreasonable in the sense that it was a decision which no reasonable body could have come to, and it was not sufficient to induce the court to find that the decision was on balance unreasonable in all the circumstances; (iii) that the fact that the local authority after conferring with other bodies or persons accepted the view of some other body or person was no evidence that the decision was unreasonable providing it was clear that the ultimate decision was the decision of the local authority arrived at upon consideration; (iv) that the failure of the local authority to supply the applicant with reasons for its decision was not of itself evidence that the decision was unreasonable. *Kissack and ors.* ("*Ulster Fatstock Co.*") *v. Ballymena B.C.* [Ch.D. 40

SLAUGHTER-HOUSE 40
See PUBLIC HEALTH.

STATUTE—VALIDITY 62
See NORTHERN IRELAND.

STATUTES—
——Civil Bill Courts Procedure Amendment Act (Ireland), 1864 (27 & 28 Vict. c. 99), s. 35 15
See ANIMAL.
——Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 5(1) 62
See NORTHERN IRELAND.
——Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926 (16 & 17 Geo. 5, c. 31), s. 3(5). 147
See MOTOR VEHICLE—DRIVING LICENCE.
——Dogs Act (Northern Ireland), 1927 (17 Geo. 5, c. 3) .. 15
See ANIMAL.
——Planning and Housing Act (Northern Ireland), 1931 (21 & 22 Geo. 5, c. 12), s. 10(2) 62
See NORTHERN IRELAND.
——Local Government Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 22), s. 22(1); Sch. 2 art. 10(1) 161
See COMPULSORY ACQUISITION OF LAND

——Factories Act (Northern Ireland), 1938 (2 Geo. 6, c. 23), s. 15 21
See FACTORIES ACTS.

—— ——s. 27 109
See NEGLIGENCE.

—— ——s. 157 21
See FACTORIES ACTS.

——Planning (Interim Development) Act (Northern Ireland), 1944 (7 & 8 Geo. 6, c. 3), s. 6(4) 62
See NORTHERN IRELAND.

——Criminal Justice Act (Northern Ireland), 1945 (9 & 10 Geo. 6, c. 15), s. 10 98
See CASE STATED.

——Slaughter-houses Act (Northern Ireland), 1953 (2 Eliz. 2, c. 21), s. 1 40
See PUBLIC HEALTH.

——Law Reform (Miscellaneous Provisions) Act, 1954 (2 & 3 Eliz. 2, c. 26), s. 4 106
See PRACTICE—PLEADING.

——Road Traffic Act (Northern Ireland), 1955 (4 & 5 Eliz. 2, c. 27), ss. 3(1) (e), 13(1) (d), 18(3) 147
See MOTOR VEHICLE—DRIVING LICENCE.

—— ——s. 39 171
See MOTOR VEHICLE—IN CHARGE UNDER INFLUENCE OF DRINK. ..

—— ——s. 39(2) 1
See MOTOR VEHICLE—DISQUALIFICATION 2.

—— ——s. 57(1) 1
See MOTOR VEHICLE—DISQUALIFICATION 2.

—— ——s. 57(4) 37
See MOTOR VEHICLE—DISQUALIFICATION 1.

—— ——s. 75 171
See MOTOR VEHICLE— IN CHARGE UNDER INFLUENCE OF DRINK.

——Betting and Lotteries Act (Northern Ireland), 1957 (5 & 6 Eliz. 2, c. 19), s. 6 .. 98
See CASE STATED.

STATUTORY DUTY—FACTORIES 109
See NEGLIGENCE.

STATUTORY RULES AND ORDERS—
——R.S.C. Or. 13, r. 3 141
See PRACTICE—COSTS.

——Or. 65, rr. 49, 51, 52 141
See PRACTICE—COSTS.

SUMMONS—SERVICE 139
See PRACTICE—SERVICE.

TORT—DISTURBANCE OF MARKET 46
See MARKET.

WORDS—
——"factory" 21
See FACTORIES ACTS

——"the public" 171
See MOTOR VEHICLE—IN CHARGE UNDER INFLUENCE ETC.

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TABLE OF CASES:

	PAGE
McCORMICK *v.* QUEEN'S UNIVERSITY OF BELFAST & ANOTHER Ch.D.	1
JEFFS *v.* DICKSON Q.B.D.	12
SHERRARD *v.* WOODS C.A.	13
CONLON *v.* MURRAY & ANOTHER C.A.	17
IN RE SCARLETT C.A.	28
CITY BRICK AND TERRA COTTA CO. LTD. *v.* BELFAST CORPORATION Ch.D.	44

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